84-678 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MOHAMMED REZA PAHLAVI and
FARAH DIBA PAHLAVI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. By dismissing this case on grounds of *forum non conveniens*, the Court of Appeals relied on New York's policy of refusing to entertain actions which have little or no nexus to the State and which, in the court's view, are burdensome to litigate. Does this State policy conflict with the United States' undertaking in the Algerian Accords, and thereby violate the Supremacy Clause of the Constitution?

2. Does the dismissal by a state court of an action on grounds of *forum non conveniens* without a prior finding that an available alternative forum exists violate principles of due process?

PARTIES TO THE PROCEEDING

The caption herein names Mohammed Reza Pahlavi and Farah Diba Pahlavi, respondents, the parties against whom the action was originally commenced in November, 1979. In July 1980, before any decision was rendered in this case the former Shah died. No party has ever been substituted for him.

Special Term dismissed the complaint as to both defendants. Plaintiff appealed as to both defendants. The Appellate Division in its decision dated May 30, 1983 ordered the parties to show cause why the appeal should not be dismissed as to the former Shah. No decision issued on that order to show cause until the Court of Appeals dismissed the appeal as to the former Shah. Pet.App. 1,n.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Islamic Republic Of Iran respectfully petitions for a writ of certiorari to review the judgment of the New York Court Of Appeals entered in this case on July 4, 1984.

OPINIONS BELOW

The opinion of the New York Court of Appeals, reported at 62 N.Y.2d 474 is set forth infra at Pet.App. 1-17. The opinion of the Appellate Division, First Department, reported at 94 A.D.2d 374, is set forth at Pet.App. 18-38 and the unreported decision of Special Term is reprinted at Pet.App. 39-74.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1257(3) to review a question arising under Article VI, Sec. 2 and Amendment XIV of the United States Constitution in a judgment rendered by the New York Court of Appeals entered on July 5, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article VI:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Amendment XIV, Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...

New York Civil Practice Law and Rules, Rule 327:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

STATEMENT OF THE CASE

On October 22, 1979, Mohammed Reza Pahlavi, the former Shah of Iran, who had fled Iran in January of 1979, arrived in New York City and was admitted into New York Hospital for treatment of cancer. Farah Diba Pahlavi, the former Empress of Iran, accompanied her husband and took up residence with the former Shah's sister, Ashraf Pahlavi, at the latter's town house on Beekman Place, New York City.

On November 30, 1979 petitioner instituted the instant action against the former Shah and his wife. Pursuant to court order, service on the former Shah was made at New York Hospital. Farah Diba Pahlavi was served by personal service on her personal bodyguard at Ashraf Pahlavi's town house.

The complaint alleges that defend-

ants, in breach of Iranian law and fiduciary duty, accepted bribes, misappropriated funds and embezzled or converted billions of dollars rightfully belonging to the National Treasury of Iran.

On January 10, 1980 defendants moved to dismiss the complaint on grounds that (a) the complaint raised non-justiciable political questions; (b) the court lacked personal jurisdiction due to defective service of process and (c) forum non conveniens. Before Special Term decided the motion, the United States Attorney for the Southern District of New York obtained a stay of the action pending resolution of the crisis in United States - Iranian relations.

In January of 1981, the United States and the Islamic Republic of Iran entered into a series of undertakings

set forth in the Algerian Accords (reprinted infra at Pet.App.75-84).*

Shortly after the United States and the Islamic Republic of Iran formally agreed to the Accords, the United States obtained a further stay of the case to provide the incoming Reagan Administration with an opportunity to review the terms of the Accords. On February 26, 1981, the Reagan Administration announced that it would honor the terms of the Accords and advised Special Term that no further adjournments would be sought.

In July of 1980, the former Shah died in Cairo, Egypt.

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* The Algerian Accords are principally composed of two Declarations of the Government of Algeria, to which the United States and Iran adhered: (1) Declarations of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), and (2) Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran ("Claims Settlement Declaration").

At Special Term, service of process on the defendants was upheld and jurisdiction over them established. The court further ruled in favor of petitioner with respect to the political question doctrine, holding that it was "error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance." Pet.App.64. As for dismissal based on act of state and sovereign immunity principles, the court held that these doctrines could not be activated "by express mandate of the terms of the Accords." Pet.App.65.

The complaint was dismissed however, on the grounds of forum non conveniens. Although Special Term acknowledged the unavailability of an alternative forum for the action, it relied on New York's traditional policy of dismissing

burdensome litigation with little or no nexus to the State.

Failing to acknowledge the special circumstances of the action and the effects of the Accords as a binding executive agreement overriding state policies and preferences, Special Term concluded that dismissal was mandated under the facts and relevant considerations set forth in controlling case law as traditionally applied. Pet.App.71-72.

On appeal to the Appellate Division, First Department, the dismissal was affirmed by a court which, once again, invoked a policy-oriented rationale, citing the burdens which would be placed on both the taxpayers and the courts of the State if such litigation were to proceed. The impact of the Accords on the litigation was not addressed and like Special Term, the court

relied upon its discretionary powers to affirm the dismissal for forum non conveniens. The notable dissent of Justice Fein however, argued that the Court's decision in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946), established the availability of an alternative forum as an essential pre-requisite of the doctrine, thereby preventing its application in the instant case. Pet.App.33.

On July 5, 1984, the New York Court of Appeals, per Judge Simons, affirmed the decision of the Appellate Division. Maintaining that the plaintiff, as a non-resident, is traditionally permitted to enter New York courts only as a matter of comity, the Court of Appeals relied on the traditional factors of inconvenience to New York courts and taxpayers as those which militated against the retention of jurisdiction.

The court paid lip service to the requirement of an alternative forum for the adjudication of plaintiff's claim, and defended dismissal by asserting that the availability of an alternative forum was not a pre-condition to dismissal under forum non conveniens but rather, a "pertinent factor" for consideration. Pet.App. 3. The court referred to the "perceived requirement" of an alternative forum as having had its "origin in dicta" in Gulf Oil Corp. v. Gilbert, supra, which was "unnecessary to the result" of that case. Pet.App.4. In any case, the court held that it was plaintiff's burden to prove the unavailability of an alternative forum even though it was defendant's burden to prove all other facts which militate against retention of jurisdiction.

With respect to the effect of the

Algerian Accords, the court had "no difficulty" in determining that the United States government did not guarantee plaintiff a New York forum for its claim. Labeling the litigation as "an internal dispute," the court held that this was "not normally a matter considered in the exercise of treaty powers and a matter which does not generally engage the national interest to the same extent as claims by nationals of one signatory nation against the other signatory nation". Pet.App. 11. (citations omitted). According no weight to the commanding language of paragraphs 12 through 16 of the General Declarations which assured the plaintiff of the availability of U.S. courts for adjudication of its claims, the court simply concluded:

> The United States has met its commitment to 'facilitate' this

> lawsuit by freezing the Shah's assets and by advising the courts that the act of state doctrine and sovereign immunity principles are not to apply to plaintiff's claim. Nothing in the record or in its communication to the trial court suggests that a promise was made that the courts would do more.

Pet.App.11.

The dissenting opinion of Judge Meyer challenged the majority's position on the issue of forum non conveniens and the alternative forum requirement as enunciated by Gilbert. Arguing that forum non conveniens is "not a technique for leaving unpopular litigants without a court to press their claim," Pet.App.15, he asserted that dismissal was improper. In so holding, he found it unnecessary to discuss the effect of the Algerian Accords other than to note that he dissented from the court's conclusion there also.

REASONS FOR GRANTING THE WRIT

This case presents two questions of great significance; one striking at the heart of basic principles of federalism and the power of the federal executive to commit the Nation to a course of conduct without interference by the states and the second an unsettled question of importance concerning the due process rights of litigants to have their claims heard despite a state's policy of refusing to hear such claims on the grounds of forum non conveniens.

The first issue presented concerns the Algerian Accords and the duty of state courts, pursuant to the Supremacy Clause of the Constitution, to give force and effect to that executive agreement which was negotiated by the President in the resolution of a major international crisis.

New York's policy of dismissing cases for forum non conveniens has rendered Point IV of the General Declaration a nullity. This usurpation of power by a state threatens to undermine the integrity of this international agreement, and, by extension, other agreements entered into with foreign nations which a state views as repugnant to its policies. Such invasion of power is strictly forbidden under the Supremacy Clause and this Court has consistently held that states are forbidden to substitute their judgments and impose parochial policy concerns in areas involving international relations.

The essential fact and the strongest reason for granting certiorari on this question is that it is impossible to sever Point IV of the General Declarations from the whole. Any decision

which refuses to give force and effect to Point IV threatens the integrity of the complete agreement and impacts directly on the federal executive's authority to conduct foreig relations. The Court should grant the petition to consider the important question of the impact of the Accords on New York's policy of refusing to entertain this action.

As to the second issue presented, Petitioner submits that the application of the New York forum non conveniens statute violates due process where it is not expressly found that there exists an available alternative forum for the litigation.

The New York Court of Appeals held that the absence of a suitable alternative forum did not require the court to retain jurisdiction of the case, noting

that this Court "has never suggested that the doctrine of forum non conveniens implicates constitutional due process rights." Pet.App. 7.

Petitioner submits that the Court's holding in Gulf Oil Corp. v. Gilbert, supra, reaffirmed recently in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), establishes without doubt that an alternative forum is a fundamental component of the forum non conveniens doctrine. It is submitted further that the alternative forum requirement is grounded in due process considerations.

The unique facts of this case provide an opportunity for the Court to define the bottom-line in state court dismissals based on forum non conveniens: is it a violation of due process for a state court to dismiss an action where no alternative forum exists in

which the action can be heard. As the Court noted in World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1979), use of forum non conveniens as a means of preventing harassment of defendants and easing crowded dockets is increasing since the expansion of the jurisdiction of state court jurisdictions under state "long arm" statutes.

This case presents a question left open in Gilbert and anticipated by the Court in Worldwide Volkswagen. What due process rights do plaintiffs have to a hearing on the merits of their claim weighed against legitimate state concerns? This case provides an opportunity to address this important question.

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE IMPORTANT QUESTION OF WHETHER NEW YORK'S POLICY OF DISMISSING SUITS FOR FORUM NON CONVENIENS VIOLATED THE UNITED STATES' UNDERTAKINGS IN THE ACCORDS

New York's policy of dismissing actions with little or no nexus to the forum conflicted directly, in this case, with the express provisions of the Algerian Accords in which the U.S. pledged to assure Iran of the availability of U.S. forum for the litigation of its claims against the former royal family. Thus failing to give force and effect to a valid executive agreement entered into by the President in settlement of a major international dispute, New York elevated parochial concerns regarding burdens to its courts and taxpayers above those expressed by the federal executive in the Accords.

This Court has long held that state

policies which conflict with treaties and other international agreements are unconstitutional invasion of federal powers under the Supremacy Clause. It is submitted that the petition herein should be granted to decide the important question of law concerning the duties of state courts to give force and effect to treaties under the Supremacy Clause.

A. The Clear Intent of the Accords is to Override Policy Considerations Such As Forum Non Conveniens in the Adjudication of Iran's Claims in U.S. Forums

The negotiating history of the Accords shows that it was the intent of the parties that U.S. courts would be available to Iran to adjudicate its claims against the former royal family in accordance with law. Thus, while the United States recognized that return of the former Shah's assets was from the

very beginning a fundamental demand of the Iranian Government, it could not commit itself to the summary seizure of the former Shah's property. The U.S. maintained that the only way such assets could be returned was pursuant to an adjudication by a U.S. court in accordance with due process of law. Within those limits, the United States' response to the Iranian demand for summary seizure of the assets took the form of a pledge in which it assured Iran of the availability of a U.S. forum to hear claims to recover those assets. This pledge was an essential quid pro quo in the negotiation of the Accords.

Thus, on November 17, 1979, only two weeks after the seizure of the United States Embassy in Tehran, as one of four points in the United States' first official approach to the Iranian govern-

ment through U.N. Secretary- General Waldheim, "[The State Department] indicated that the courts of the United States would be available to the government of Iran to hear its claims for the return of the assets it believed had been illegally taken out of Iran." Summary Report, The Hostage Crisis in Iran: 1979-81, submitted by Secretary of State Edmund Muskie, in Hearings before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess., February 17, 18 and March 4, 1981 (hereinafter "Summary Report"), at 21.

The final negotiating process that ultimately led to the Accords began with a Resolution of the Islamic Consultative Committee (the Majlis) adopted on November 2, 1980. Proposal 4 of the Resolution, as communicated to the United States, read as follows:

> The properties of the deceased Shah must be returned. The United States government should officially recognize the right of the Iranian government to the deceased shah's wealth and that of his close relatives. According to Iran law, these properties belong to the Iranian nation and Iran should be able to control them. The president of the United States should issue a proclamation to this effect, and take all legal and administrative actions necessary to transfer these properties to Iran.

Reprinted in A. Lowenfeld, Trade Controls for Political Ends, (2d Ed. 1983) (hereinafter "Lowenfeld"), Doc. Supp. at 809.

The United States communicated its views on this point to the Iranian government on December 3, 1980. The instant case then pending in New York Supreme Court is specifically referred to:

> [U]nder the laws of the United States, the only entity within the United States Government which could lawfully transfer the property or assets of the former Shah or his relatives to the Government

> of Iran would be a U.S. court acting pursuant to a legal proceeding brought by the Government of Iran. In fact, Iran has brought such a proceeding, which is now pending in an American court (Islamic Republic of Iran v. Mohammed Riza Pahlavi and Farah Diba Pahlavi, pending in the Supreme Court of the State of New York, Index No. 22013/79), and that pending case affords Iran an opportunity to prove its rights to have the properties and assets in question transferred to Iran. The United States Government will facilitate efforts of the Government of Iran to obtain and enforce a judgment in the manner described in the United States position delivered by the Algerian delegation on November 12, 1980.

Lowenfeld, supra, Doc. Supp. at 815.

Following these exchanges and further negotiations and consultations, the parties agreed and adhered to the final text of the General Declaration. Thus, the final settlement as embodied in the Accords was predicated on the consistent position of the United States that the proper way to achieve the return of any assets belonging to Iran was through a

judicial proceeding. This case was in the contemplation of the parties when they adhered to the Accords. There can be no doubt that when the United States government assured Iran of the availability of a U.S. forum, that assurance applied to this very case which was then pending in the Supreme Court of New York.

The general intent to provide a U.S. forum for litigation of Iran's claims was fortified by the provisions of the Accords concerning the mechanics of assuring the availability of a forum that would be able to consider the merits of Iran's claims and the satisfaction of any judgment that might ensue. Thus, the United States agreed to freeze assets within the control of the former Shah's estate or of any close relative "served as a defendant in U.S.

litigation brought by Iran to recover such property and assets." (General Declaration, para.12.) It agreed, further, to assist in compiling information concerning the whereabouts of such assets. (para.13). In addition, it agreed to intercede on Iran's behalf to inform U.S. courts in which such actions were pending that "they should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine ...." (para.14). Finally, the United States guaranteed the enforcement of the final judgment in any such action to the extent of assets located in the United States. (para.15). The fact that paragraphs 12 through 16 compose almost one fourth of the text of the General Declaration is a ready indicator of the United States' intent that these provisions be treated as more than

mere empty promises.

Testimony before Congress, after the effective date of the Accords, by State Department officials who had been responsible for the negotiations, reinforces the position that the Accords were designed to open U.S. courts to Iran in accordance with U.S. law. In its report to the Senate Foreign Relations Committee, the State Department stated, "We have agreed to block the transfer of any properties belonging to the Shah's estate that may be located here while U.S. courts determine legal ownership." (Summary Report, p.24). Although it is apparent from the tenor of the testimony that he was seeking to minimize the extent of the concessions granted, Warren Christopher, former Deputy Secretary of State, acknowledged that Iran's claims would "have to be

adjudicated in United States courts in full accordance with our constitutional protections and our due process." Id., at 139. Roberts Owen, former Legal Adviser to the State Department, added that the United States would provide assistance "while Iran seeks to vindicate any rights it may have in U.S. courts under U.S. law." Hearings before the House Subcommittee on International Economic Policy and Trade, 97th Cong., 1st Sess., March 5, 1981, at 22.

The intent of the Accords to override parochial policy concerns is a central theme of Point IV of the General Declarations and is expressed in the pertinent negotiating history set forth above. It was apparent when the Accords were negotiated that judicial redress would have to come from state courts, as Iran's claims were non-federal, did not

arise under the Constitution or laws of the U.S. and did not come within diversity jurisdiction. The only courts open to Iran were state courts. Thus, when the U.S. pledged to assure Iran of the availability of a U.S. forum, the President, in the lawful exercise of his foreign relations powers, (see infra at subpoint B) committed the nation to a policy potentially at odds with those of the several states. It is clear from the above, however, that the successful resolution of the international crisis depended, in part, on the strength of this pledge and on the President's ability to commit the United States and the several states to this agreement.

B. The Algerian Accords Constitute A Treaty for Recognition Under Article VI of the Constitution

Pursuant to Article VI, the Constitution, laws and treaties of the United

States are the supreme law of the land and the courts of every state are bound thereby. At issue here is the failure of New York to give effect to an executive agreement negotiated and entered into by the Federal Executive in the settlement of a major foreign policy dispute. Petitioner submits that the Accords are tantamount to a treaty for Article VI purposes and as such, the courts of New York were bound to give force and effect to the pertinent provisions of the General Declarations.

It is a central tenet of federalism that governmental power over foreign affairs is not distributed, but vested exclusively in the federal government. History has dictated: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." James Madison in Federalist

Paper No.42. The President, as the "sole organ of federal government in international relations," U.S. v. Curtiss-Wright, 299 U.S. 304,320 (1936), has the power under Article II, Section 2 of the Constitution to enter into treaties with foreign nations, contingent upon their ratification by the Senate. In his executive capacity however, the President is also empowered to undertake major foreign policy commitments on behalf of the United States in the form of international compacts and agreements which require no such ratification. United States v. Pink, 315 U.S. 203,233 (1941). United States v. Belmont, 301 U.S. 324,330 (1936). This Court has therefore recognized that while such agreements do not comply with the ratification formalities required by the Constitution, they are to be "treat-

ed with similar dignity for the reason that complete power over international affairs is in the national government." Pink, 315 U.S. at 223, quoting Belmont, 301 U.S. at 330.

This well established principle was specifically applied when the Court upheld the Accords in Dames & Moore v. Regan, 453 U.S. 654 (1980). While petitioner recognizes that the Court in Dames & Moore examined particular provisions of the Accords regarding the establishment of an international arbitral tribunal, it submits that those provisions dealing with the assets of the members of the former royal family must be given similar binding effect. The cases cited above teach that executive agreements in their complete and unabridged form are to be accorded supreme recognition. In the instant case,

the provisions of the agreement which address the availability of a forum for Iran's adjudication of its claims against the royal family are a part of the same instrument which was upheld by this Court in Dames & Moore. They were adopted by the same presidential act, in settlement of the same international crisis and thus are of equal force and effect.

C. New York's Courts, in Dismissing The Action on Grounds of Forum Non Conveniens, Countermanded the Undertakings of the United States in the Algerian Accords and Usurped Powers Reserved Solely to the Federal Executive

It is a well-settled holding of this Court that state laws and policies must yield when they are inconsistent with or impair the provisions of overriding federal treaties or international agreements. United States v. Pink, 315 U.S. 203 (1941); United States v. Bel-

mont 301 U.S. 324 (1936); see also, Zchernig v. Miller, 389 U.S. 429 (1968); Kolovrat v. Oregon, 366 U.S. 137 (1961).

Indeed, a clear analogy can be drawn between the facts of the instant case and those presented in Belmont and Pink. In those cases too, the Court upheld the power of the Executive to effectuate a settlement of claims which was integrally related to the normalization of relations with a foreign state. Acknowledging the United States' desire to recognize and resume diplomatic relations with the Soviet Union in 1933, the Court upheld the validity of the Litvinov Assignment and condemned the attempt of the New York courts to circumvent a national undertaking:

> Power to remove such obstacles to full recognition as settlement of claims of our nationals... certainly is a modest implied power of the President.... No such obstacle can be placed in the way of rehabi-

> litation of relations between this country and another nation, unless the historic conception of the powers and responsibilities... is to be drastically revised.

Pink, 315 U.S. at 229-30.

Thus, while the law of New York recognized neither the legality of Soviet expropriations nor the validity of Soviet claims to assets held in New York, this Court refused to give effect to such localized concerns and upheld the mandate of the executive agreement. Resting its decision upon "the highest considerations of international comity and expediency," Belmont, 301 U.S. at 328, the Court concluded:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate and when judicial authority is invoked in the aid of such consummation, State Constitu-

> tions, state laws, and state policies are irrelevant to the inquiry and decision.

U.S. v. Belmont, 301 U.S. at 331-32.

Here too, the United States, through its Executive, committed itself to perform certain promises and obligations in the course of resolving a dispute with a foreign power. By failing to adhere to the policy set by the Executive the New York courts have struck a course which threatens to "imperil the amicable relations between governments and vex the peace of nations". Belmont, 301 U.S. at 328.

The concept of federal supremacy with respect to foreign affairs does not find its outer limits in overriding the decisions of state courts but extends itself so far as to supercede the enforcement of state laws as well. See, Zchernig v. Miller, 389 U.S. 429 (1968);

Kolovrat v. Oregon, 366 U.S. 187 (1961); Hines v. Davidowitz, 312 U.S. 52 (1941). When the laws of the several states have threatened to intrude upon or hinder federal policies enunciated by international treaties which have sought to respect the rights of aliens, for example, this Court has upheld the rights of aliens and invalidated conflicting state laws. Hines v. Davidowitz, 312 U.S. 52, 66 (1941). Central to the Court's reasoning in these decisions has been a pragmatic acknowledgement of the fact that a spirit of reciprocity necessarily pervades the atmosphere of foreign affairs:

> This country, like other nations has entered into numerous treaties of unity and commerce since its inception...Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our territory, but secured reciprocal promises and guarantees for our own citizens while in other lands.

Id. at 65. See Zchernig v. Miller, supra, (refusing to enforce an Oregon statute which authorized the withholding of remittances to legatees residing in communist countries), Kolovrat v. Oregon, supra, (where the court held that a treaty concerning rights of inheritance of aliens supervened Oregon's policy which prohibited inheritance of property by citizes and residents of Yugoslavia).

The Court's teachings in the above-cited cases are clear: intrusions by the states into areas constitutionally committed by the Supremacy Clause to the Federal Executive cannot be tolerated. State policies which conflict with the letter or intent of international undertakings - executive agreements or treaties - must yield to the national purpose as expressed in that instrument. In the

realm of international relations the stakes are too high to permit state policies to override national ones:

> Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government.

Hines v. Davidowitz, supra, at 64. It is clear that the most minor intrusions into the international domain can affect the conduct of foreign relations in a persistent and subtle way. Zchernig v. Miller, supra.

In the instant case the State policy of summarily dismissing cases with little or no nexus to the State for reasons bottomed on court congestion and burdens to the taxpayers conflicts with the express pledge to Iran that a U.S. forum would be available to it to adjudicate its claims. The State policy

given effect by the New York Court of Appeals renders this significant aspect of the Accords a nullity. Petitioner submits the Court should grant certiorari on this important question and settle whether New York's policy interferes with the conduct of international affairs in violation of basic principles of federalism.

II. THE DECISION OF THE NEW YORK COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S HOLDINGS CONCERNING DISMISSAL OF ACTIONS BASED ON FORUM NON CONVENIENS

The New York Court of Appeals, in affirming the dismissal of petitioner's action, stated "[t]he Supreme Court, while ruling with respect to procedural rights in the federal courts, has never suggested that the doctrine of forum non conveniens implicates constitutional due process rights." Pet.App. 7. Petitioner submits that this is erroneous reading of the Court's opinions on forum non conveniens. While the Court has never expressly held that dismissal on forum non conveniens grounds is limited by procedural due process, the few cases in which the Court has considered the doctrine undeniably imply that the alternative forum requirement is grounded in the due process rights of the plaintiff

to have his claims heard. Moreover, the Court has on numerous occasions expressly held that there are constitutional limitations upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of its cause.

The doctrine of forum non conveniens has increased in importance as a direct result of the increased use of state long-arm statutes to obtain jurisdiction over non-resident defendants. Though the Court has been concerned primarily with the due process rights of defendants, the use of forum non conveniens by state courts to clear their dockets of complex and burdensome cases raises important questions concerning the due process rights of plaintiffs who have successfully invoked a state's jurisdiction. If these questions are not

settled, the Court's efforts in relaxing jurisdictional requirements will be frustrated by the infringement by state courts upon the due process rights of plaintiffs.

A. This Court Has Ruled that an Alternative Forum is a Prerequisite to Dismissal for Forum Non Conveniens

Since Gulf Oil Corp. v. Gilbert, supra, the Court has treated the availability of an alternative forum as a precondition to operation of the forum non conveniens doctrine. Indeed, in Gilbert, it was only after the Court determined that Virginia was an available forum that it proceeded to balance the factors favoring or militating against retention of the action in New York.

Thus the rule laid down in Gilbert,

"[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." Id., at 507, was applied by the Court, even though, due to the existence of an alternative forum, there was no occasion to apply the rule directly to that case.

The Gilbert Court's discussion immediately following the above-quoted rule points up the radical departure the New York Court of Appeals has taken in its application of the New York forum non conveniens statute, CPLR 327. In this section of the opinion the Court discussed the use of forum non conveniens as a means of defeating plaintiff's choice of a forum when that choice had the effect of harassing the defendant.

The doctrine defeats such a strategy by permitting the action to go forward in a more convenient forum - assuming, of course, that such a forum exists.

In sharp contrast with this formulation of the doctrine, itself "an instrument of justice", Rogers v. Guaranty Trust Co., 288 U.S. 123, 151 (1933) (Cardozo, J. dissenting), the Court of Appeals in the instant case has approved the use of this doctrine as a means of dismissing an unpopular litigant outright (see dissent of Meyer, J. Pet.-App.11-17.). Indeed, the decision of the Court of Appeals makes a mockery of the New York forum non conveniens statute, which provides, in pertinent part, "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court,...may stay or dismiss the

action in whole or in part on any conditions that may be just."

Petitioner submits that dismissal without a finding of an alternative forum cannot within reason constitute "in the interest of substantial justice" (see discussion in subpoint B below). It is submitted further that the plain language of the statute, "the action should be heard in another forum", is a paraphrase of the Gilbert rule requiring an alternative forum.

The Gilbert rule was recently reaffirmed in Piper Aircraft Corp. v. Reyno, 444 U.S. 235, 254, n.22, (1981), where it was stated:

> At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. Gilbert, 330 U.S., at 506-507. In rare circumstances, however, where the remedy offered by the other

> forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. Cf. Phoenix Canada Oil Co. v. Texaco, Inc. 78 F.R.D. 445 (Del. 1978) (court refuses to dismiss, where alternative forum is Educador, it is unclear Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted).

As the Court's reference to Phoenix Canada Oil case indicates, there may be an additional requirement to the mere existence of an alternative forum; i.e. one that can afford meaningful relief to the plaintiff.

This latter formulation is but the logical extension of the alternative forum requirement and a recognition of the controlling fact: application of the doctrine forum non conveniens - codified or common law- must comport with mini-

mal requirements of due process.

Despite the New York Court of Appeals characterization of the Gilbert rule as dicta, Pet.App.6-7, an overwhelming number of courts follow the Gilbert rule to require a viable alternative forum as an essential precondition to operation of the doctrine. See e.g., Schertenleib v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978); Dahl v. United Technologies Corp., 632 F.2d 1027,-1029 (3d Cir.1980); Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248 (5th Cir. 1983); Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 612 (6th Cir. 1984); Weiner v. Shearson, Hamill & Co., 521 F.2d 817, 82[illegible] (9th Cir. 1975); Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481, 1483 (10th Cir. 1983); La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983);

Pain v. United Technologies Corp., 637 F.2d 775, 779 (D.C. Cir. 1980) cert. denied, 454 U.S. 1128 (1981); MacLeod v. MacLeod, 383 A.2d 39 (Me. 1978); Harry David Zutz Ins. Co., Inc. v. HMC Association Ltd, 360 A.2d 160 (Del. 1976);

Not only is the New York Court of Appeals inconsistent with its own prior holdings, see, Varkonyi v. Varig, 22 N.Y.2d 333 (1968), but with the settled law of the Circuit Courts and the highest courts of other states. Petitioner respectfully submits that on this ground alone, the Court should grant the petition to settle this conflict.

B. The Requirement of an Alternate Forum is Obviously Grounded in the Due Process Rights of Plaintiffs

Petitioner submits that this case, in which forum non conveniens was applied even though no alternative forum exists, is one of first impression. Thus

it is not surprising that this Court has never expressly held dismissal under these circumstances to be violative of plaintiff's due process rights.

Yet what else has compelled this Court to specifically state, on two occasions, that the doctrine presupposes that an alternative forum exists? Gulf Oil, supra, at 507; Piper Aircraft, supra, at 234. What has caused the lower courts, both federal and state, to follow the rule that an alternate forum is a prerequisite to dismissal specifically finding that another forum exists before applying the Gilbert factors? (See, e.g., Macleod v. Macleod, supra, and cases cited therein.) Petitioner has found but one reported case that expressly states the obvious: "[The requirement of an alternative forum] is clearly grounded on due process con-

siderations. If dismissal of an action on forum non conveniens grounds were not conditioned on the availability of another forum, the plaintiff might find himself with a valid claim but nowhere to assert it." Farmanfarmaian v. Gulf Oil Corp., 437 F.Supp. 910,915 (S.D.N.Y. 1977), citing Esso Transport v. Terminales, 352 F.Supp. 1030 (SDNY 1972), and Tivoli Realty v. Interstate Circuit, 107 F.2d 155 (5th Cir.) cert. denied, 334 U.S. 837 (1948).

This Court has stated "[The doctrine of forum non conveniens] was designed as an instrument of justice." Williams v. Green Bay & W.R. Co., 326 U.S. 549, 554 (1946). Justice Cardozo teaches, "Courts must be slow to apply [the doctrine] when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused."

Rogers v. Guaranty Trust Co., supra, 288 U.S. 123, 151 (1933) (dissenting opinion). The lower courts have also hinted at the policy considerations that are inherent in the Gilbert rule. See, e.g., Veba-Chemie A.G. v. M/V Getafix, supra, at 1248 ("if no other forum is available to plaintiff at the time of dismissal, it would be exceedingly harsh to dismiss for forum non conveniens); Esso Transport v. Terminales, supra, at 1032 (finding of alternative forum is to insure plaintiff his day in court).

Because the facts of this case provide, for the first time, a situation in which even the dismissing court has found that there is no other forum in the world to hear this claim, the Court is provided with an opportunity to reaffirm its holding in Gulf Oil v. Gilbert and re-emphasize the due process

grounds upon which the alternative forum requirement is grounded.

The Court has expressly held, in analogous contexts, that outright dismissal on procedural grounds must comport with the requirements of due process. See, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982); Societe Internationale v. Rogers, 357 U.S. 197 (1958); Hovey v. Elliot, 167 U.S. 409 (1897).

The Logan case concerned an employee discharged in violation of the Fair Employment Practice Act. Although he filed a timely complaint with the Illinois State Fair Employment Practices Commission, the Commission did not hold a hearing within the period required by State law. Although the Commission attempted to process Logan's claim regardless of the statutory limitation, the

State's highest court held that Logan's claim was barred by the statute. This Court expressly found that the Due Process Clause applied to the dismissal, stating "The court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan, supra, at 429.

The Court then noted: "Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions." Logan, supra, at 437.

The case was reversed and remanded on the ground that Logan had been unconstitutionally denied his right to a hearing on the merits of his claim, the court holding:

> The Fourteenth Amendment's Due Process Clause has been interpreted as preventing the states from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]". Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

Id., at 430.

See also, Societe Internationale v. Rogers, supra, in which the district court dismissed the complaint of a Swiss holding company for failure to fully comply with a pretrial production order. This Court reversed, holding, "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id. at 209. The Court determined that denying plaintiff a hearing on the merits of its case raised "serious constitutional questions," and re-

manded so that plaintiff could proceed to the merits of its case.

In both Logan and Societe Internationale, the court has determined that plaintiff's due process rights must be considered before a court, even in support of its own policies, may dismiss an action. The New York Court of Appeals, has expressly disregarded the holdings of this Court. In this respect, this case affords the Court an opportunity to reaffirm its decisions relating to the procedural due process rights of plaintiffs.

C. Petitioner is Entitled to Due Process Protections

The Due Process Clause of the Fourteenth Amendment to the Constitution provides; "nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

Petitioner is, for the purposes of the Due Process Clause, a "person", its cause of action against the former Shah and his wife is property protected by the Clause, and dismissal of the action by the New York State's highest court fulfills the "state action" requirement.

Although this Court has never expressly held that foreign states are entitled to the guarantees of the Due Process Clause, it has found foreign States to be persons as defined in the Clayton Act. Pfizer, Inc. v. Government of India, 434 U.S. 308, reh. denied 435 U.S. 910 (1978).

One circuit has specifically found foreign states to be persons entitled to due process. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981). Other circuits have, without discussion, ap-

plied due process rights to foreign states. See, e.g., Olsen by Sheldon v. Mexico, 729 F.2d 641, 648 (9th Cir. 1984); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1352 (11th Cir. 1982). It is well settled that a cause of action is a property right, Logan v. Zimmerman Brush Co., supra, at 430; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); and that the decision of a state court is "State action" as defined by the Due Process Clause. Palmore v. Sidoti, ___ U.S. ___, 104 S. Ct. 1879, 1881 (1984); Shelley v. Kraemer, 334 U.S. 1, 14 (1978). It is clear that petitioner meets the threshold requirements of the Due Process Clause and is entitled to the full protection of the Clause.

Unless settled by the Court, the due process rights of plaintiffs will continue to be violated by the Courts of New York and other states which follow New York's lead in summarily dismissing burdensome litigation. Petitioner submits this question requires resolution and respectfully urges the Court to grant the petition.

CONCLUSION

The Court should grant the petition to provide opportunity for full consideration of the questions presented herein.

Respectfully submitted,

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October 2, 1984

APPENDIX

ISLAMIC REPUBLIC OF IRAN, Appellant, v MOHAMMED REZA PAHLAVI et al., Respondents.

OPINION OF THE COURT

SIMONS, J.

Plaintiff, the Islamic Republic of Iran, brings this action against Iran's former ruler, Shah Mohammed Reza Pahlavi, and his wife, Empress Farah Diba Pahlavi. It alleges in its complaint that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds in breach of their fiduciary duty to the Iranian people and it seeks to recover those funds and 20 billion dollars in exemplary damages. It asks the court to impress a constructive trust on defendants' assets located throughout the world, for an accounting of all moneys and property received by the defendants from the government of Iran, and for other incidental relief.

[1] The action was commenced in November, 1979 by substituted service on the Shah made at New York Hospital where he was undergoing cancer therapy. The Empress was personally served at the same time at the New York residence of the Shah's sister, Ashraf Pahlavi. Thereafter, defendants moved to dismiss the complaint alleging that it raised nonjusticiable political questions, that the court lacked personal jurisdiction due to defective service of process on them and that the complaint should be dismissed on grounds of *forum non conveniens*.[1] Special Term granted defendants' motion based on *forum non conveniens* concluding that the parties had no connection with New

1. [1] The Shah died while the motion was pending before Special Term and no party has been substituted to represent him. Accordingly, the appeal should be dismissed (CPLR 1021).

York other than a claim that the Shah had deposited funds in New York banks, a claim which it found insufficient under the circumstances to justify the court in retaining jurisdiction. A divided Appellate Division affirmed, Justice Fein arguing in dissent that jurisdiction must be assumed because no other forum was available to plaintiff.[2]

On this appeal plaintiff claims that the courts below erred, that the New York courts must entertain this action because the record does not indicate that there is any alternative forum available and because the United States Government undertook to guarantee plaintiff an American forum to litigate its claims against the former royal family in the hostage settlement agreements between it and plaintiff known as the Algerian Accords.

[2, 3] There should be an affirmance. The application of the doctrine of *forum non conveniens* is a matter of discretion to be exercised by the trial court and the Appellate Division. We do not find that those courts abused their discretion as a matter of law under the circumstances presented, even though it appears that there may be no other forum in which plaintiff can obtain the relief it seeks. Nor is reversal required by the provisions of the Algerian Accords.

I

Ordinarily, nonresidents are permitted to enter New York courts to litigate their disputes as a matter of comity. Obviously, however, our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State. The common-law doctrine of *forum non conveniens*, also articulated in CPLR 327,[3] permits a court to stay or

2. Defendant argues that the court lacks personal jurisdiction over her, even though she was served in accordance with applicable State law, because her contacts with this State were insufficient under modern standards of due process (see *Shaffer v Heitner*, 433 US 186, 203-204). Special Term rejected this argument and defendant has cross-appealed. This court dismissed defendant's cross appeal on March 22, 1984 on the ground that she was not a party aggrieved. (See Cohen and Karger, Powers of the New York Court of Appeals [rev ed], § 91, p 395.)

3. The statute reads as follows: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (see, generally, Siegel, NY Prac, § 28; 1 Weinstein-Korn-Miller, NY Civ Prac, par 327.01, pp 3-469 — 3-470). The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (see *Piper Aircraft Co. v Reyno,* 454 US 235; *Bader & Bader v Fort,* 66 AD2d 642) and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (*Banco Ambrosiano, S.p.A. v Artoc Bank & Trust,* 62 NY2d 65; *Irrigation & Ind. Dev. Corp. v Indag S. A.,* 37 NY2d 522, 525; *Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense* [*Varig*], 22 NY2d 333, 335). The court may also consider that both parties to the action are nonresidents (*Bata v Bata,* 304 NY 51) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*Silver v Great Amer. Ins. Co.,* 29 NY2d 356, 361). No one factor is controlling (see *Irrigation & Ind. Dev. Corp. v Indag S. A., supra;* see, also, *Piper Aircraft Co. v Reyno,* 454 US 235, *supra; Gulf Oil Corp. v Gilbert,* 330 US 501, 508). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (*Martin v Mieth,* 35 NY2d 414, 418; *Silver v Great Amer. Ins. Co., supra*). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (*Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, supra; Irrigation & Ind. Dev. Corp. v Indag S. A., supra; Varkonyi v Varig, supra,* at p 337).

[2] Here, the trial court and the Appellate Division considered all of the relevant factors, including the fact that there may be no alternative forum in which this claim can be tried because of the political situation in Iran under

the Khomeini regime. They also noted the substantial financial and administrative burden on the New York courts, the genesis of the claims in Iran, the likely applicability of Iranian law, the nonresidence of both parties and that plaintiff was requesting a sweeping review of the conduct of the Shah's government during the 38 years of his reign, a review which undoubtedly would require extended trial and pretrial proceedings and which would necessitate the appearance of many foreign witnesses not only to establish liability but also to discover and evaluate defendant's assets. Indeed, plaintiff's appendix lists two and one-half pages of single-spaced typewritten entries of property of all kinds throughout the world allegedly owned or controlled by defendant and the royal family through the Pahlavi Foundation. The courts below, after reviewing these factors, concluded that the public interest factors involving the court system and the private interest factors affecting defendant outweighed plaintiff's claim to litigate this action in the New York courts notwithstanding the unavailability of an alternative forum.

Plaintiff contends that this was error because the availability of an alternative forum is not merely an additional factor for the court to consider but constitutes an absolute precondition to dismissal on *conveniens* grounds.

The perceived requirement that an alternative forum must be available had its origin in dicta by the United States Supreme Court in *Gulf Oil Corp. v Gilbert* (330 US 501, 507, *supra*). Writing for the court, Justice Jackson stated (at pp 506-507): "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." The *Gulf Oil* case involved a New York dismissal of a Virginia-based action on the ground that all the relevant contracts were with Virginia. Unlike the present case, there was plainly an alternative forum present in *Gulf Oil* and the court's statement was unnecessary to the result. Nevertheless, the dictum has persisted and has been quoted in subsequent cases (see, e.g., *Piper Aircraft Co. v Reyno*, 454 US 235, *supra; Calavo Growers v Belgium*, 632 F2d 963, 968) and scholarly treatises (1 Weinstein-Korn-

Miller, NY Civ Prac, par 327.02, p 3-479). Indeed, dicta in many of this court's decisions have also stated it as a general rule (see, e.g., *Irrigation & Ind. Dev. Corp. v Indag S. A.*, 37 NY2d 522, 525, *supra; Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361, *supra; Varkonyi v Varig*, 22 NY2d 333, *supra*).

Without doubt, the availability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss but we have never held that it was a prerequisite for applying the *conveniens* doctrine and in *Varkonyi* we expressly described the availability of an alternative forum as a "pertinent factor", not as a precondition to dismissal (at p 338). Nor should proof of the availability of another forum be required in all cases before dismissal is permitted. That would place an undue burden on New York courts forcing them to accept foreign-based actions unrelated to this State merely because a more appropriate forum is unwilling or unable to accept jurisdiction (see Korbel, Law of Federal Venue and Choice of Most Convenient Forum, 15 Rutgers L Rev 607, 611, n 28; see, also, *Ferguson v Neilson*, 58 Hun 604, opn in 33 NY St Rep 814, 11 NYS 524; *Noto v Cia Secula di Armanento*, 310 F Supp 639). Moreover, even if we were to hold that the motion should be denied if no alternative forum is available, then the burden of demonstrating that fact should fall on plaintiff. Its presence in the New York courts is a matter of choice and permitted because of comity and the public and private burden of its action appearing, it should justify the need for New York to assume jurisdiction (Blair, Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col L Rev 1, 33-34 [holding that there need not be an alternative forum available before dismissal is warranted]). The result may appear arbitrary to some but *forum non conveniens* dismissals are not the only instance in which New York courts decline to entertain jurisdiction even though no alternative forum may exist. Typically, the courts also refuse to adjudicate claims otherwise actionable because they involve unclean hands, diplomatic immunity and claims in which the applicable law is penal in nature or is contrary to the public policy of the forum State (see Restatement, Conflict of Laws 2d, § 85, and Comment *a;* §§ 89, 90; Siegel, Conflicts in a Nutshell, §§ 49-53).

In this case the convenience of the plaintiff is served because it acquired jurisdiction over defendant in New York. That circumstance is entitled to some weight, although less than usual because nonresident parties are involved (see *Piper Aircraft Co. v Reyno*, 454 US 235, 255-256, *supra*), but generally, a plaintiff must be able to show more than its own convenience for selecting the forum when the choice imposes a heavy burden on the court and the defendant (*Gulf Oil Corp. v Gilbert, supra,* at p 508). To that end, plaintiff claims the action should proceed in this jurisdiction because assets of the Shah are located here. Nothing before us establishes that fact, however, and the Surrogate's Court has apparently found no grounds for ancillary administration of the estate yet (see n 1, *infra*). The absence of an alternative forum is the only substantial consideration advanced for denial of the motion.

Arrayed against this is the substantial burden upon the courts of this State and the possibility that its judgment may be ineffectual because of its inability to impose a constructive trust on defendant's assets if they are not in New York. Moreover, defendant probably cannot defend this claim in any realistic way because the witnesses and evidence are located in Iran under plaintiff's control and are not subject to the mandate of New York's courts. Indeed, plaintiff's counsel conceded on oral argument that ideally the action should be maintained in Iran but contended that New York was the better forum. If the action cannot be maintained in Iran, however, under laws which result in judgments cognizable in the United States or other foreign jurisdictions where the Shah's assets may be found, then that failure must be charged to plaintiff. It is, after all, the government in power, not a hapless national victimized by its country's policies. Any infirmity in plaintiff's legal system should weigh against its claim of venue, not impose disadvantage on defendant or the judicial system of this State.

As the dissent states (and as has been noted above), some courts and commentators have taken the view that an action will not be dismissed on *forum non conveniens* grounds unless a suitable alternative forum is available to plaintiff (see *Gulf Oil Corp. v Gilbert,* 330 US 501, 508,

supra [dictum]; Restatement, Conflict of Laws 2d, § 84, p 251; see, also, *Vandam v Smit,* 101 NM 508; *Hill v Upper Miss. Towing Corp.,* 252 Minn 165). At the threshold we note that the Supreme Court, while ruling with respect to procedural rights in the Federal courts, has never suggested that the doctrine of *forum non conveniens* implicates constitutional due process rights. Although the existence of a suitable alternative forum is a most important factor to be considered in applying the *forum non conveniens* doctrine, its alleged absence does not require the court to retain jurisdiction. Plaintiff has failed to establish that no alternative forum exists and, even if it were assumed that normally an alternative forum is a prerequisite and that plaintiff has none, a *forum non conveniens* dismissal is still warranted when plaintiff's chosen forum is unable to afford the parties appropriate relief (Restatement, Conflict of Laws 2d, § 85). Despite the fact that plaintiff's complaint requests monetary relief, it really seeks a sweeping review of the political and financial management of the Iranian government during the several years of the late Shah's reign with the object of accounting for and repossessing the nation's claimed lost wealth wherever it may be located throughout the world. For the reasons stated, that relief cannot properly be afforded by a New York forum with little if any nexus to the controversy and the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral (*Silver v Great Amer. Ins. Co.,* 29 NY2d 356, 361, *supra; Bata v Bata,* 304 NY 51, 56, *supra; Pietraroia v New Jersey & Hudson Riv. Ry. & Ferry Co.,* 197 NY 434, 439).

Finally, it should be noted that the Federal cases cited in the dissent rest upon the Federal "change of venue" statute (US Code, tit 28, § 1404, subd [a]) which is substantially different from New York's CPLR 327 because a successful motion under Federal law results in a transfer of the case to another district within the country. New York's statute contains no similar provision (Siegel, NY Prac, § 28, p 28).

In sum, the record does not demonstrate a substantial nexus between this State and plaintiff's cause of the ac-

tion. That being so the courts below could, in the exercise of their discretion, dismiss the action on grounds of *forum non conveniens* notwithstanding the fact that the record does not establish an alternative forum where the action may be maintained and they could do so without conditioning their dismissal on defendant's acceptance of process in another jurisdiction.

II

The crisis arising from the seizure of American hostages in Iran was settled on January 19, 1981 when Iran and the United States executed the General Declaration and the Claims Settlement Declaration, agreements commonly known as the Algerian Accords. These agreements dealt primarily with the unfreezing of Iranian assets located in the United States and the method for resolving suits by nationals of the United States against the government of Iran. They also provided that the United States Government would take certain steps in connection with legal actions involving the Shah's property. Specifically, the United States agreed to freeze the Shah's assets within this country, to inform United States courts that in any litigation involving Iran and the Shah's estate sovereign immunity and the Act of State doctrine were not available as defenses and to guarantee the enforcement of any final judgments involving these matters. Any claimed failure of the United States to meet these treaty obligations was made subject to arbitration between the signatories in a specially designated international tribunal and its award of damages to plaintiff for the breach could be enforced in the courts of any nation. In addition, a summary statement issued by the United States Government prior to the signing of the Accords stated that it would advise American courts of the right of the Iranian government to bring an action in this country to recover the Shah's assets. Plaintiff contends that these promises preclude New York courts from dismissing the action on *forum non conveniens* grounds.

[3] At the time the Accords were executed, this action had been instituted in Supreme Court and there was pending a motion to dismiss, made several months earlier,

based upon defendant's contentions that the action involved a nonjusticiable political question, that plaintiff had unclean hands and on grounds of *forum non conveniens*. Indeed, the action was mentioned in an earlier communication of the United States directed to the government of Iran on December 3, 1980. Nevertheless, although the Accords when finally concluded contained specific provisions concerning plaintiff's claims against the Shah and his family, they contained no reference to the pending suit asserting those claims nor did the United States guarantee that a forum would be available to plaintiff to litigate them.

Plaintiff asserts, however, that various statements issued by the State Department when read in conjunction with these treaties evidence a commitment by the United States to assure that New York courts would entertain plaintiff's claim. It refers particularly to a State Department summary of the United States position on the Iranian situation, which indicated that the Federal Government would "facilitate any legal action" brought by the government of Iran to recover on claims to the former Shah's assets and request the court's assistance in obtaining information about such assets (Summary Report, Hostage Crisis in Iran; 1979-1981, submitted by Secretary of State Edmund Muskie in Hearings before the Senate Committee on Foreign Relations, 97th Cong, 1st Sess, Feb. 17, 18 and March 4, 1981, p 14).

Generally, a treaty is to be construed according to principles applied to written contracts between individuals and the clear language of the treaty controls unless it is inconsistent with the intent or expectations of the parties (*Sumitomo Shoji Amer. v Avagliano*, 457 US 176; *Sullivan v Kidd*, 254 US 433, 439; *Hamilton v Erie R. R. Co.*, 219 NY 343, 352-353). Permissibly the history of the treaty, diplomatic correspondence and other extraneous documents may be considered to discover that intent (see *Sumitomo Shoji Amer. v Avagliano, supra*, at p 180; *Maximov v United States*, 373 US 49, 54; *Ross v Pan Amer. Airways*, 299 NY 88; and see, generally, Restatement, Foreign Relations Law of United States [rev-Tent Draft No. 1], § 329 *et seq.*). We have no difficulty interpreting the Accords and

the extraneous evidence submitted by the parties to determine that the United States Government did not guarantee plaintiff a New York forum for its claim. Neither the agreements nor the statement of the Summary Report indicates otherwise when analyzed in terms of the natural and ordinary meaning of the words used (see *Sullivan v Kidd, supra,* at p 439; *Hamilton v Erie R. R. Co.,* 219 NY 343, 352-353, *supra*). The Federal Government simply expressed a willingness to "facilitate" or aid Iran in bringing the claims, presumably by complying with the limited promises it made in the Accords. Indeed, inasmuch as treaties are subject to constitutional restraints (*Reid v Covert,* 354 US 1; Restatement, Foreign Relations Law of United States [rev-Tent Draft No. 1], § 304), it is questionable whether the Federal Government could guarantee a New York forum by treaty without violating constitutional principles of federalism and separation of powers (see, generally, *Guaranty Trust Co. v United States,* 304 US 126, 140 [Statute of Limitations]; see, also, *United States v Pink,* 315 US 203, 216, 230-234).

The precedents cited by plaintiff are not helpful (*Dames & Moore v Regan,* 453 US 654; *United States v Pink,* 315 US 203, *supra; United States v Belmont,* 301 US 324). Those cases concern the broad powers of the Federal Government to mandate that the resolution of claims against Iran by nationals of the United States shall be pursued in an international tribunal (*Dames & Moore v Regan, supra*), or to implement the right of the Soviet government (by assignment to the United States) to recapture Russian assets held by Americans or American institutions in this country (*United States v Pink, supra; United States v Belmont, supra*). Such commitments of the Federal Government to resolve claims between the signatories or nationals are viewed liberally because unless resolved the claims may provide continuing irritations and conflicts which interfere with peaceful relations between the nations. Similar commitments are made in Points I-III of the General Declaration and in the Claims Settlement Declaration of the Accords and are not at issue here. This is litigation by foreign government against its own national who happened to be within the State of New York at the

time this suit was commenced. It involves an internal dispute, not normally a matter considered in the exercise of treaty powers and a matter which does not generally engage the national interest to the same extent as claims by nationals of one signatory nation against the other signatory nation (see Nowak-Rotunda-Young, Constitutional Law [2d ed], p 202).

The parties have culled statements from the various documents and communiques and the testimony of witnesses before the Senate allegedly supporting their respective positions. The evidence suggests, however, that the State Department recognized the problems inherent in this litigation and the restraints of federalism in our system of government and that, as Mr. Warren Christopher, the United States negotiator, stated in his testimony before the Senate, the courts would have to decide whether plaintiff had "a right [to maintain this action] within our legal system" (Senate Committee on Foreign Relations Hearing, 97th Cong, 1st Sess, Feb. 17, 1981, at p 56). The United States agreed that plaintiff would not be foreclosed from pursuing its claim in our courts by preclusive doctrines of international law but it did not undertake to guarantee the opportunity for plaintiff to prove its claim in the New York courts. The United States has met its commitment to "facilitate" this lawsuit by freezing the Shah's assets and by advising the courts that the Act of State doctrine and sovereign immunity principles are not to apply to plaintiff's claim. Nothing in the record or in its communication to the trial court suggests that a promise was made that it or the courts would do more.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

MEYER, J. (dissenting). The majority cites several sections of the Restatement of Conflict of Laws, Second, but rejects section 84, the only section directly in point, cites *Piper Aircraft Co. v Reyno* (454 US 235) but ignores the effect of its footnote 22, cites CPLR 327 but ignores its language and its legislative history. Its conclusion is, moreover, inconsistent with that of "[t]he majority of jurisdictions * * * that an alternative forum is not merely a factor in analysis, but rather *an essential prerequisite* to

application of *forum non conveniens*" (*MacLeod v MacLeod*, 383 A2d 39, 43, n 3 [Me]; italics in original). Respectfully, therefore, I dissent.

Section 84 of the Restatement is unequivocal. Its statement of *forum non conveniens* is clear and direct: "A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action *provided that a more appropriate forum is available to the plaintiff*" (emphasis supplied). The import of the underscored words is emphasized by its Comment *c*, which states that: "The two most important factors look to the court's retention of the case. They are (1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and *(2) that the action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Because of the second factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states*" (emphasis supplied).

That the United States Supreme Court agrees on the essentiality of an alternative forum is clear from its statement of the rule in *Gulf Oil Corp. v Gilbert* (330 US 501, 507), quoted by the majority. That there existed an alternative forum in that case does not make the presence or absence of such a forum any the less a factor "necessarily involved in the case or essential to its determination" (Black's Law Dictionary [4th ed], p 541 ["Dictum"]). Rather, the court's holding was that it was required to consider whether there was an alternative forum before it could balance the other interests involved. Only after having determined that Virginia was an available forum did the *Gilbert* court proceed to balance the equities. *Gilbert* would not have been decided differently if the rule now announced by the majority had been applied, but that does not mean that the rule which *Gilbert* announced was not a holding. Thus, we find the Supreme Court once again carefully considering, as not just a factor, but as one that must be determined "[a]t the outset of any *forum non conveniens* inquiry * * * whether there exists an alternative forum" (*Piper Aircraft Co. v Reyno*, 454 US 235, 254, n 22) and concluding that: "Ordinarily, this requirement will

be satisfied when the defendant is 'amenable to process' in the other jurisdiction. *Gilbert*, 330 U.S., at 506-507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."

Similarly in *MacLeod* (383 A2d, at p 43, *supra*) the Supreme Judicial Court of Maine, after noting that the record did not "display any other facts so much as hinting that the defendant is subject to personal jurisdiction anywhere else in American territory", held it error to dismiss an action against a nonresident over whom personal jurisdiction had been obtained in Maine except on condition that he, by submitting to the jurisdiction of a court of the State of plaintiff's residence, assured the existence of a true alternative forum. Even the State's interest was held subject to the requirement: "From the standpoint of the State of Maine, it is generally undesirable to expend our judicial resources in resolving a dispute between nonresident parties *if* such is avoidable without depriving the plaintiff of a forum" (italics in original).

A like result necessarily follows from the plain language of CPLR 327, which authorizes stay or dismissal of an action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum". If the majority's view were correct, the rule would apply when "the action should not be heard in this forum." The reference to "another forum" presupposes that there is another forum.

Not only the plain language of the section, but also the history of its adoption bears out this conclusion. The section was added to the CPLR in 1972 on the recommendation of the Judicial Conference. Its report states that under the proposed provision jurisdiction may be declined if the court finds "that the forum is seriously inconvenient for the trial of the action *and that a more appropriate forum is available*" (Seventeenth Ann Report of NY Judicial Conference, 1972, at p A35 [italics supplied]). It notes also that its proposal was based upon Professor Hans Smit's Report

On Whether to Adopt in New York, in Whole or in Part, the Uniform Interstate and International Procedure Act (Thirteenth Ann Report of NY Judicial Conference, 1968, p 130), which repeatedly states as a fundamental that "the action could better be adjudicated in another forum" (p 136, see, also, pp 138, 139).

CPLR 327 reflects the basic approach of the Uniform Interstate and International Procedure Act (IIPA) as to *forum non conveniens* (Fifteenth Ann Report of NY Judicial Conference, 1970, p A114). It differs, however, in that it inserted the words "on the motion of any party" which the 1970 Report explained in the following paragraph: "This proposal differs somewhat from the IIPA in that it would not permit the court to apply the doctrine of forum non conveniens on its own motion over the objections of all the parties. This reflects the considered view of the Committee that when the court has jurisdiction of an action or proceeding, the convenience of the court alone should not be sufficient to bring this equitable doctrine into operation where all parties prefer to carry on the litigation in this state." It is, thus, evident that the convenience of the court alone was never intended to have the importance which the majority opinion attributes to it.

The Restatement rule "that a more appropriate forum is available to the plaintiff" comports with the principles of equity and comity, upon which the *forum non conveniens* doctrine rests. Its "absurd complexity" prior to statutory reform (Braucher, Inconvenient Federal Forum, 60 Harv L Rev 908, 930) resulted from the confusion of various distinct policies under the same title. Thus, as Braucher pointed out (*id.*, at pp 912-914), Blair (29 Col L Rev 1), upon whom the majority relies (majority opn, at p 481), confused principles of jurisdiction and venue, which should result in nondiscretionary dismissal with principles of abuse of process and trial convenience, where dismissal is discretionary, but which result in inconsistent policies. Those factors were untangled by the statutory reform of which CPLR 327 was a part. Earlier proposals made the bounds of jurisdiction depend on the discretionary question of convenience (Act, Recommendation and Study Relating to Service of Process on Foreign Corporations, NY Legis

Doc, 1959, No. 65[C], pp 56, 57, 58 [1959 Report of NY Law Rev Comm, pp 69, 124, 125, 126]). The present CPLR, however, makes the bounds of jurisdiction a question of law, depending on the extent of contacts with the State (CPLR 302) and makes *forum non conveniens* discretionary (CPLR 327) but dependent on the finding that an alternative forum is available. *Forum non conveniens* is a necessary antidote to the greatly expanded jurisdiction provided by "long-arm" statutes such as CPLR 302 (Homburger and Laufer, Expanding Jurisdiction Over Foreign Torts: 1966 Amendment of New York's Long-Arm Statute, 16 Buffalo L Rev 67, 73-74). It is, however, a "flexible procedure for the discretionary determination of place of trial" (Braucher, 60 Harv L Rev, at p 939, and see *id.*, at pp 931-932), not a technique for leaving unpopular litigants without a court to press their claims.

The majority cites no case, and none has been called to our attention, which holds that dismissal on *forum non conveniens* grounds is permissible in the absence of an alternative forum. Not only is the Restatement rule recognized in ALR annotations without any indication that any court has ever held otherwise (48 ALR2d 800, 815 ["It has been generally held that the doctrine cannot be applied where the defendant is not subject to suit in the forum which he alleges to be more convenient"]; 9 ALR3d 545, 548 ["the courts in a number of cases have held that jurisdiction of a matrimonial action between nonresident litigants will be assumed or denied depending upon whether the defendant was in fact amenable to and willing to accept the process of the other state"]), but also there are a number of cases which hold that, as a matter of law, the court must retain jurisdiction when no other forum exists to hear the claim (*MacLeod v MacLeod,* 383 A2d 39 [Me], *supra; Wilburn v Wilburn,* 192 A2d 797 [DC App]; *Rodriguez v Pan Amer. Life Ins. Co.,* 311 F2d 429, vacated on Act of State grounds 376 US 779; *North Branch Prods. v Fisher,* 284 F2d 611, cert den 365 US 827; *Glicken v Bradford,* 204 F Supp 300; *Phoenix Canada Oil Co. v Texaco, Inc.,* 78 FRD 445, cited with approval on this issue in *Reyno's* footnote 22 [454 US, at p 254], *supra;* see Wright, Federal Courts [3d ed], p 186, n 23). In each of

those cases the court applied the alternative forum requirement as a precondition to the application of *forum non conveniens* and in each case put the burden on the defendant to prove the existence of the alternative forum.

The dismissal of the instant action on *forum non conveniens* grounds makes it possible for defendant, subject as the courts below have held to the jurisdiction of our courts, to abort that jurisdiction without offering to submit to jurisdiction elsewhere and without any finding that there is an alternative forum. The suggestion of the majority that it is plaintiff's burden to establish that no alternative forum exists is inconsistent with the authorities cited above. Moreover, its reliance on the appropriate relief exception of section 85 of the Restatement is inconsistent with both *Bata v Bata* (304 NY 51) and the Restatement itself. In *Bata,* as in the present case, the action was brought to establish a constructive trust on the basis of a claimed violation of fiduciary duty in a foreign country. We concluded that (304 NY, at p 57): "We realize that this suit may, when it comes to trial, be found to involve property, transactions and laws almost entirely foreign to New York State. Nevertheless, on the record before us, we cannot say that there was no basis at all for retaining jurisdiction here."

Comment *b* to section 85 of the Restatement also makes clear its inapplicability:

"A court will be reluctant to dismiss the action if there is no other convenient state in which the plaintiff could obtain more appropriate relief. If no such other state is available, the court will not dismiss unless the plaintiff's cause of action is contrary to the strong public policy of the forum (see § 90), or unless the court believes that the ends of justice would better be served by giving the plaintiff no relief at all rather than by giving him such relief as it could grant.

* * *

"It will, however, entertain the action if no other forum able to render such relief is open to the plaintiff, and if the court feels that the ends of justice would better be served by giving the plaintiff such relief as it can grant."

All its dramatic stage decoration aside, this case presents the fairly ordinary situation of a defendant who, although a former resident of the plaintiff's jurisdiction, has no intention of returning. In such a situation, jurisdiction must be retained by the jurisdiction in which the refugee has been properly served.

To paraphrase *MacLeod* (383 A2d, at p 43): "We would ill serve the interests of justice and comity should we shut the doors of the [New York] Courts to this plaintiff who has in reality no 'alternative' forum." Concluding as I do that the court is wrong in approving dismissal in the absence of the offer by defendant of an alternative forum (and, indeed, even with such an offer, in doing more than staying the instant action), I find it unnecessary to discuss the effect of the Algerian Accords, other than to note that I dissent from its conclusion there also. It is necessary to add, however, in view of the majority's discussion of public policy, unclean hands and the like as affecting the acceptance by the court of jurisdiction of this case, that, for the reasons stated in the dissent of Justice Fein below, the record here does not permit a dismissal on these alternative bases.

Chief Judge COOKE and Judges JASEN, JONES and WACHTLER concur with Judge SIMONS; Judge MEYER dissents and votes to reverse on the appeal as against Farah Diba Pahlavi in a separate opinion; Judge KAYE taking no part.

On appeal as against defendant Farah Diba Pahlavi: Order affirmed, with costs.

On appeal as against defendant Mohammed Reza Pahlavi: Appeal dismissed, without costs.

ISLAMIC REPUBLIC OF IRAN, Appellant-Respondent, v MOHAMMED REZA PAHLAVI, Defendant, FARAH DIBA PAHLAVI, Respondent-Appellant.

First Department, June 30, 1983

SUMMARY

CROSS APPEALS from so much of an order of the Supreme Court at Special Term (IRVING KIRSCHENBAUM, J.), entered November 20, 1981 in New York County, as (1) granted a motion by defendants to dismiss the complaint on the ground of *forum non conveniens*, and (2) denied a motion by defendant Farah Diba Pahlavi to dismiss the complaint for lack of personal and subject matter jurisdiction.

HEADNOTE

Courts — Forum Non Conveniens — Action by Foreign Government — Abuse of Monarchic Powers

The granting of a motion to dismiss the complaint in an action by the Islamic Republic of Iran against the former Shah and Empress of Iran based upon the alleged misconduct of the Shah in enriching himself and his family through the exercise and misuse of his powers as emperor on the grounds of *forum non conveniens* is affirmed; the suit involving enormous sums of money and numerous assets throughout the world is based on acts in Iran relating to the affairs thereof and is to be governed by Iranian law; it is doubtful whether the courts of this State are competent to pass on whether an absolute monarch of a foreign country can be held responsible for personally profiting from the use of his attendant powers; Iran is the most appropriate forum, and the taxpayers and courts of New York should not be burdened with this lawsuit at the behest of plaintiff government which has failed in its fundamental obligation to provide a system of impartial courts; moreover, there are questions as to whether plaintiff has obtained personal jurisdiction over defendants; the jurisdiction of a foreign State over its nationals may be qualified where said national's life or liberty would be endangered if he were to return to the nation or if the national has been forced to flee because of a political regime that is hostile to him.

APPEARANCES OF COUNSEL

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Roger Boyle of counsel (*Boyle, Vogeler & Haimes*, attorneys), for respondent-appellant.

OPINION OF THE COURT

SILVERMAN, J.

This is an appeal from an order of Special Term, Supreme Court, granting a motion to dismiss the complaint on the ground of *forum non conveniens*. We affirm.

This is a suit by the Islamic Republic of Iran against the former Shah of Iran and his wife, the former Empress of

Iran, based upon the alleged misconduct of the Shah in enriching himself and his family through the exercise and misuse of his powers as emperor.

If entertained, the suit will be extremely burdensome to the people, taxpayers and the courts of this State. The amounts involved are enormous — many billions of dollars. The assets referred to are numerous and enormous and located all over the world. What is sought is no less than a review by the courts of this State of the exercise by the Shah of his powers as absolute monarch of a great Nation over a period of a quarter of a century to determine whether and by how much the Shah and the Empress personally and improperly profited. It would be an understatement to say that this lawsuit would be as burdensome as a total of hundreds of ordinary lawsuits. And the courts of New York are asked to assume this burden while our criminal justice system is crumbling because of inadequate facilities; prisoners sit in jails for months awaiting trials; civil litigants are delayed because our courts are so overcrowded. And, of course, the cost of this suit to the taxpayers of New York would be very great.

All of this would have to be borne if this were legitimately a New York matter. But it is not. It is an Iranian matter, a suit by the Islamic Republic of Iran against its former ruler and his wife, nationals (and still presumably domiciliaries, never having elected a new domicile) of Iran, based on acts in Iran relating to the affairs of Iran.

The suit would presumably be governed by Iranian law. It may be questioned whether the law of Iran ever contemplated a suit against the Shah for misconduct in office; but in any event whatever the guess may be, it will have to be a guess as to *Iranian law*.

We doubt that the courts of this State are really competent to pass on whether an absolute monarch of a foreign country can be held responsible for personally profiting from the use of his powers as an absolute monarch.

In this State and in this country the guess as to Iranian law would have to be made by American Judges brought up and trained in American law, history and political philosophy, and the mores of a democratic republic and the

prevailing concepts in this country as to the responsibilities and obligations of public officials in such a republic.

For us, and perhaps generally in countries that have a constitutional government, the rule of law is that public office is a public trust, not to be used for the office holder's personal profit and subject to rules of fiduciary responsibility. (Of course we do not suggest that the use of public office for private profit is unknown in this country; however, the rules of law applicable to such cases in this country are fairly well established.) But do we have the right to impose our concepts of the responsibility of public office on the activities within a foreign country of its absolute monarch? Are we justified in applying American concepts of fiduciary responsibility to this situation, or is the case to be governed by Louis XIV's dictum "*L'état, c'est moi*", or some other rule — and this under unformulated Iranian law!

Repugnant as it may be to our philosophy, there can have been very few absolute monarchs in the history of the world who did not profit personally from their powers as such monarchs. The royal families of history did not become wealthy because they were shrewd private businessmen or farmers. One thinks of Elizabeth I and monopolies; the Kings of Spain and the wealth of the New World; the Tsars of Russia; King Solomon's mines, etc., etc. And even today it is said that the King and the royal family of Saudi Arabia and the rulers of the other oil rich States of the Middle East have become enormously wealthy by the use of their powers and influence as rulers. These rulers and their families are said to have large investments and bank deposits in this country. Are the courts of New York really competent to hold these rulers responsible under our concept of fiduciary responsibilities for their use of their monarchical powers?

This surely looks like the "political thicket" out of which courts should stay.

The dispute is as we say an Iranian dispute to be governed by the laws of Iran. What connection does New York have with it? That the Shah spent a few weeks in a hospital in New York may be a basis for in personam jurisdiction. It is irrelevant to *forum non conveniens* considerations. (Inci-

dentally, the Shah spent more time, after leaving Iran, in Mexico, Panama and Egypt than he did in New York, so why are we favored with this litigation?)

Although the list of assets does include some assets with a relation to New York, this is not a case of a dispute as to the ownership of specific property in this State. The complaint asks to impress a constructive trust on assets of the defendants throughout the world; it asks for an accounting of all moneys and property of any kind received by the defendants from the government of Iran, together with all profits derived therefrom; it asks for general compensatory damages totaling $35 billion, and total damages of over $55 billion. This is plainly a transitory action arising in Iran.

All of the foregoing is recognized by our brother who would retain jurisdiction in New York, but he asks if this lawsuit cannot be brought in New York, where else can it be brought? Where is the more appropriate forum?

The obvious answer — in a civilized world and society — would be Iran, which has all the relevant contacts. The defendants would of course contend that they cannot get a fair trial before an impartial tribunal in Iran; and they may well be right. And implicit in the plaintiff's position is that at least the prevailing perception in non-Iranian countries is that the present regime in Iran is "a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (CPLR 5304, subd [a], par 1), and thus the judgment of its courts would not be entitled, either as a matter of comity or of absolute right, to recognition in jurisdictions having principles similar to New York.

For almost any other plaintiff, this would be a sound and fair reason for bringing a suit outside Iran. But this plaintiff is the Islamic Republic of Iran — the government of Iran. It is a fundamental obligation of every civilized government to provide a system of impartial courts which can fairly adjudicate disputes involving its citizens. As plaintiff is the government of Iran, that is plaintiff's own obligation. And if this plaintiff has failed in that fundamental obligation, we do not see why the citizens, taxpay-

ers and courts of this State should be subjected to the enormous burden of this lawsuit at the behest of the government which has failed to meet this fundamental obligation.

There are of course also questions as to personal jurisdiction.

The Uniform Foreign Money-Judgments Recognition Act, CPLR article 53, requires as conditions for conclusive recognition of a foreign country judgment that the judgment not only be rendered under a system which provides impartial tribunals or procedures compatible with due process of law, but also that the foreign court shall have had personal jurisdiction over the defendant. (CPLR 5304, subd [a].) Such jurisdiction may exist because the defendants are domiciliaries of the foreign State (CPLR 5305, subd [a], par 4), or indeed because they are nationals of that State. (Restatement, Conflict of Laws 2d, § 31; Thirteenth Ann Report of NY Judicial Conference, 1968, p 221; see *Blackmer v United States,* 284 US 421.) With respect to jurisdiction based on nationality, the Restatement (*op. cit.*, p 127) provides: "§ 31. Nationality and Citizenship. A state has power to exercise judicial jurisdiction over an individual who is a national or citizen of the state unless the nature of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable." Comment *c* under this statement includes as examples of qualifications on the jurisdiction of a foreign State over its nationals: "[T]he extent, if any, to which the national's life or liberty would be endangered if he were to return to the nation * * * The judgment is also likely to be denied recognition and enforcement if the national has been forced to flee from the nation because of a political regime that is hostile to him, even though he may hope to return to the nation once the regime has been overthrown" (*id.*, p 128). These qualifications obviously apply to the Empress and applied to the Shah after his flight. But again the personal danger, and the unfairness to the defendants of recognizing the exercise of personal jurisdiction by the courts of Iran over the defendants, is little more than another facet of the failure of the government of Iran to provide fair and

impartial tribunals in which the property and money claims against the Shah can be fairly determined.

It may well be that it is wholly unrealistic to ask this of a revolutionary regime like that of Iran. Robespierre's regime in France, or the Bolshevik regime in the time of Lenin, could not be expected to provide calm, impartial tribunals to hear property claims against the Bourbons or the Romanovs. If this means that defendants-wrongdoers, — if they are wrongdoers — may escape liability in the civil courts, perhaps that is just one of the inevitable concomitants of a revolution. (Perhaps, even, the revolutionary remedy and the judicial remedy against rulers are fundamentally incompatible, so that the revolutionary government can no more seek judicial relief against its former rulers than the former rulers can against the revolutionary government.) But none of that makes it the responsibility of New York to provide to the revolutionary regime that system of fair, impartial, safe and generally recognized tribunals which the revolution has made impossible in Iran. They are not reasons for imposing on the people of New York the huge burden of this lawsuit.

Nor should the fact that plaintiff chose to bring its suit in New York, rather than in one of the other jurisdictions where the Shah sojourned after his flight, force us to accept the burden of that suit.

New York will have fully discharged its limited responsibility to provide a system of justice applicable to the dispute between plaintiff and its former rulers if New York courts are available for the determination of disputed claims to the ownership of specific property having a situs in New York. That is not this case; it is not even a case arising out of a specific and specifically described and identified transaction (as to which we express no opinion).

On July 27, 1980, while the motion was pending in Special Term, the defendant former Shah of Iran died.

CPLR 1015 (subd [a]) provides: "If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties."

We have not been informed of any such substitution, and apparently at least as of the time of Special Term's decision

no personal representative of the defendant former Shah of Iran had been appointed.

CPLR 1021 provides in part: "Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed."

Accordingly, this court directs that such an order to show cause why the appeal should not be dismissed with respect to the defendant former Shah of Iran shall issue, and the appeal will be held in abeyance with respect to the action against the former Shah of Iran pending the determination on such order to show cause.

As to the action against defendant Farah Diba Pahlavi, the former Empress of Iran, the order of the Supreme Court, New York County (IRVING KIRSCHENBAUM, J.), entered November 20, 1981 granting defendant's motion to dismiss the complaint pursuant to CPLR 327 on the ground of *forum non conveniens,* should be affirmed, with costs.

KUPFERMAN, J. P. (concurring). I concur that the order by Special Term dismissing the complaint on the ground of *forum non conveniens* should be affirmed. Under the exceptional circumstances of this case, dismissal on that ground was not an abuse of discretion despite the apparent absence of a viable alternative forum.[1]

Based on equitable considerations of justice, fairness, and convenience, *forum non conveniens* is a flexible doctrine, codified in New York (CPLR 327),[2] whereby a court may in its discretion decline to exercise jurisdiction over a transitory cause of action which does not bear a substantial nexus to the State of New York. (See *Martin v Mieth,* 35

1. A more logical forum in which to try this action would be Egypt inasmuch as the Shah died in Egypt and spent more time there than in New York. However, it is unlikely that defendants would consent to jurisdiction in Egypt, and the record fails to set forth the jurisdictional law of Egypt or of any other possible forum.

2. That section provides in relevant part: "Rule 327. Inconvenient forum. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."

NY2d 414, 418; *Irrigation & Ind. Dev. Corp. v Indag S.A.*, 37 NY2d 522, 526; *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361.)

This litigation between two successive despotic regimes of a distant Nation bears no substantial nexus to the State of New York. Special Term, in its memorandum decision, considered all of the relevant factors for determining whether New York is an inconvenient forum for the trial of a particular action. (See *Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense* [*Varig*], 22 NY2d 333, 338.) None of these considerations points to New York as a convenient forum for the trial of this action except the possible lack of an alternative forum. None of the events complained of took place in New York. No mention is made of the presence in New York of any witnesses whose testimony would be required. Nor would it serve the convenience of the court, an important consideration (see *Bata v Bata*, 304 NY 51, 56), to be required to interpret and apply Iranian law.[3]

Reyling on *Gulf Oil Corp. v Gilbert* (330 US 501), and its progeny, for the proposition that the *non conveniens* doctrine "presupposes at least two forums in which the defendant is amenable to process" (330 US, at p 507), the dissent holds that the absence of an alternative forum to which defendant would either consent or be amenable to jurisdiction precludes dismissal on *forum non conveniens* grounds.

However, in *Gulf Oil Corp. v Gilbert* (*supra*) the United States Supreme Court acknowledged the inherent power of a court to decline to exercise jurisdiction in the interests of justice where exceptional circumstances exist (330 US, at p 504; see, also, *Canada Malting Co. v Paterson Co.*, 285 US 413, 422-423).

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3. Iranian law under the Shah was based on an entirely different set of principles from those underlying American jurisprudence. Codified more than 50 years ago, the Iranian law then in effect drew its tenets from both Islamic and European sources. (See *Farmanfarmaian v Gulf Oil Corp.*, 437 F Supp 910, 924 [SDNY, 1977], affd 588 F2d 880.)

The complaint charges that the late Shah, aided and abetted by his wife, breached a duty of trust allegedly applicable under the terms of his constitutional monarchy, by converting national assets to his personal use. Plaintiff has failed to plead with particularity (CPLR 3016, subd [e]) the substance of the applicable foreign law.

In *Noto v Cia Secula di Armanento* (310 F Supp 639 [SDNY, 1970]), the court declined to exercise jurisdiction over a suit between aliens arising from an explosion of a tanker in an Iranian port. In that case, Judge WEINFELD (p 648) rejected the argument that the absence of an alternative forum in which defendants would be subject to jurisdiction precluded the court from exercising its discretion under *forum non conveniens* to dismiss the suit.[4]

Aside from considerations of the burden of trying this action in the already congested courts of New York, Special Term providently exercised its discretion to protect our courts from becoming embroiled in the internal politics of a foreign Nation. By what standard would a New York court pass judgment on the perquisites of an emperor? No court should be required to serve as a paymaster of the spoils of empire, or referee between dictators. (Cf. *Stone v Freeman,* 298 NY 268, 270-271; *Flegenheimer v Brogan,* 284 NY 268.)[5]

FEIN, J. (dissenting). The issue on this appeal is *forum non conveniens,* not whether we approve of the government of Iran, or even whether the complaint is dismissable for failure to state a cause of action.

Plaintiff, the presently constituted government of Iran, brought this action in November, 1979 against the former

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4. In dismissing the complaint in that case, Judge WEINFELD stated (p 648): "Despite these overwhelming factors, which strongly support refusal of jurisdiction, plaintiffs contend that dismissal of these suits is foreclosed, since the doctrine of forum non conveniens 'presupposes at least two forums in which the defendant is amenable to process; [it] furnishes criteria for choice between them.' They argue that none of the defendants here is amenable to process in an obviously more convenient foreign forum; nor has any defendant agreed to submit to such foreign jurisdiction. In sum, plaintiffs contend that upon this ground alone the Court is without discretion in the matter and lacks power to decline to entertain jurisdiction. This Court does not agree. Essentially, the discretion which the Court is called upon to exercise under the doctrine * * * invokes the Court's inherent power to decline jurisdiction 'in the interest of justice.'"

It is noteworthy in this respect that CPLR 327 authorizes a court to dismiss an action in the interest of substantial justice upon *any* conditions that may be just. The rule does not by its terms require that the dismissal be conditioned on defendant's consent to jurisdiction in another forum.

5. Of course this line of cases, involving the refusal of a court to enforce an illegal contractual arrangement, is factually distinguishable from the present case. The underlying principle, however, is applicable. A court should not lend its aid to a corrupt or evil design. One who seeks equity must do equity.

rulers of Iran, defendant Mohammed Reza Pahlavi (the Shah) and his wife, defendant Farah Diba Pahlavi (the Empress), alleging misappropriation and conversion of several billion dollars worth of property. The complaint seeks imposition of a trust and an accounting as to assets held by defendants individually and "in the name of the Pahlavi Foundation or other foundations, corporations, organizations, or associations"; an injunction against sale, transfer, removal, disposal or other alienation of these assets; compensatory damages of $20 billion and $5 billion, and punitive damages of $1 billion and $500 million, against the respective defendants; and recovery of $30 billion in money and property allegedly converted.

At the time of the commencement of this action, the Shah was a patient at New York Hospital in Manhattan. Defendants had fled Iran in January of 1979, during the political upheaval by which plaintiff succeeded to power there, and in June of that year their odyssey in exile brought them to temporary safety in Mexico. There they remained until October, when they flew to New York on a temporary entry visa so that the Shah, suffering from cancer, could obtain special medical treatment here. The Empress took up residence during this sojourn at the home of the Shah's sister in Manhattan while the Shah was hospitalized. It was during defendants' two-month stay in New York that the United States Embassy and Consulates in Iran were overrun and American citizens were taken hostage. Among plaintiff's demands in exchange for release of the hostages was that the Shah and all his wealth be returned to Iran.

Three and a half weeks later, on November 27, 1979, this action was commenced with service of a summons and complaint upon the Empress by mailing of the papers to her sister-in-law's residence and delivery to a bodyguard there by a New York City deputy sheriff (CPLR 308, subd 2). After unsuccessful attempts at serving the Shah personally at New York Hospital, plaintiff obtained a court order on November 30 permitting alternative service personally upon the administrator or night administrator of

New York Hospital, as well as mailed service upon Secretary of State Cyrus Vance in Washington, the District Director of the United States Immigration and Naturalization Service in New York, former Secretary of State Henry Kissinger, and Chase Manhattan Bank Chairman David Rockefeller (CPLR 308, subd 5; 308, subd 2). Mailed service was also effected upon Robert and Richard Armao, the Shah's personal representatives and spokesmen who had earlier been personally served, with some difficulty, at the hospital. The alternative service on the Shah, by personal delivery to the hospital night administrator permitted by the court order, as well as the mailed service to the Shah, the Armaos and the persons designated in the court order, all took place on or after November 30, 1979, the date of the Supreme Court order authorizing such service. The previous day the Mexican government had withdrawn permission for the Shah to return to that country, rendering defendants "stateless", in effect "persons without a country". Although the Empress was served by substituted service just prior to the Mexican government action, it is clear that the Manhattan residence of her sister-in-law was the Empress' "actual abode" as well as her "last known residence" at the time (cf. *Feinstein v Bergner*, 48 NY2d 234, 241; CPLR 308, subd 2). As to the Shah, mailed service upon him at both New York Hospital and the address where his wife was temporarily residing in Manhattan was in effect substituted service upon him "at his last known residence", as directed by the Supreme Court order (CPLR 308, subd 5; 308, subd 2), as permanent a residence as he then had anywhere. The form of service authorized by the Supreme Court was reasonably calculated to give defendant notice of the lawsuit and an opportunity to be heard (*Dobkin v Chapman*, 21 NY2d 490, 501, 505). Moreover, the announced decision of the Mexican government on November 29 obviated the possible necessity of service by mail to the defendants' last known address in Mexico, where they had resided from June through October.*

* The Shah never did return to Mexico. Defendants departed for Panama, by way of Texas, in December, 1979, and were eventually given safe haven in Egypt, where the Shah died in July, 1980.

This was not a case of fortuitous transitory presence. Defendants came here voluntarily. They had been in the State for almost 40 days before service was effected upon them. Their physical presence was sufficient for personal jurisdiction (*Hanson v Denckla*, 357 US 235; *International Shoe Co. v Washington*, 326 US 310, 316; *Pennoyer v Neff*, 95 US 714). Moreover they had no other "last known residence".

It is not too clear from the majority opinion whether it is premised, in part at least, upon the conclusion that there is an absence of personal or subject matter jurisdiction. However, that issue is not really here. The appeal we decide relates to *forum non conveniens*. It is well settled that a motion to dismiss for *forum non conveniens* presumes jurisdiction (*Bader & Bader v Ford*, 66 AD2d 642, 647, app dsmd 48 NY2d 649; *Silver v Great Amer. Ins. Co.*, 29 NY2d 356; *Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense* [*Varig*], 22 NY2d 333; *Gulf Oil Corp. v Gilbert*, 330 US 501).

Moreover, Special Term, in the order appealed from, concluded that there was personal and subject matter jurisdiction. Plaintiff, the sole appellant, obviously does not appeal from that determination. The concurring opinion acknowledges such jurisdiction. Hence the significance of the discussion of domicile in the majority opinion does not appear. Although the majority opinion disclaims knowledge of Iranian law, it concludes that the Shah and the Empress are domiciliaries of Iran. How a person who has in effect been exiled from his or her country is still domiciled in that country for any legal purpose does not appear, and, in any event, is irrelevant. The issue is jurisdiction, which does not depend upon domicile. Nevertheless, the death of the Shah prior to decision on the dismissal motion should have resulted in action toward appropriate substitution before the decision was rendered.

CPLR 1015 (subd [a]) provides: "If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Special Term, in denying the Shah's removal as a party

defendant, acknowledged that the Shah's death did not extinguish the claims against him. But where timely substitution has not been made in the wake of the death of a party defendant, the court should entertain an appropriate motion for substitution by appointment of a representative, even at the behest of the plaintiff, or by an application by order to show cause why the action should not be dismissed as to that defendant (CPLR 1015, subd [a]; 1021; see McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1021:2, p 224). There should be a remand for that purpose. (*Mazzeo v Marrone*, 46 AD2d 788; *Turner v Milligan*, 37 AD2d 896.)

The Empress argues for dismissal for lack of subject matter jurisdiction under the political question doctrine. It requires no feat of memory to be reminded of those dark and sordid days when plaintiff's surrogates, in a cruel reign of terror, deprived American citizens of their freedom under conditions devoid of any semblance of respect for their persons and their rights and in complete disregard of international law. But access to our courts of law has never been based upon the good character of the complainant. The same standards of subject matter jurisdiction are applied to all who seek to litigate here, no matter how repulsive their conduct may be. Only in this way will justice truly be served. The fact that plaintiff, whose leaders have recently heaped such scorn upon the institutions of this Nation, has chosen to press its claims in the courts of New York is not without irony. This lawsuit is itself a mark of the reputation of our courts in the international community for fairness and objectivity. The question of plaintiff's unclean hands is better left to the court which will hear the merits of plaintiff's claim for equitable relief. The effrontery of plaintiff in instituting this lawsuit in our courts, at the very moment that it was holding our citizens hostage, needs no further comment. The irony is plain.

While courts generally defer to the executive branch of government on purely political questions, not every issue with political overtones will divest the court of jurisdiction. It is still the judiciary's function to resolve issues of law, "regardless of the political context in which such questions arise." (*Matter of Anderson v Krupsak*, 40 NY2d 397, 404.)

We are not called upon here to pass judgment upon a quarter century of American foreign policy toward Iran, nor does this action necessarily concern internal Iranian politics. Rather, this case appears to raise traditional questions of law and fact, the merits of which need not be touched upon here. Regardless of the political context, issues of conversion, misappropriation and breach of fiduciary duty do not involve political dogma so as to divest the court of jurisdiction. In essence, these are the claims alleged, even though it is asserted that the funds in question were unlawfully taken from the government of Iran and its people.

Whether the law of Iran ever contemplated a suit against the Shah for misconduct may very well be an appropriate subject of a motion to dismiss upon the ground that the complaint fails to state a cause of action cognizable in our courts. This has nothing to do with *forum non conveniens*.

As Special Term noted, after the agreement between the United States and Iran, providing, *inter alia*, for the release of the hostages, had been signed and after the Reagan administration had an opportunity to review it, the United States announced that it had agreed in point IV, paragraph 12 of the agreement, in part, as follows: "The United States will freeze and prohibit any transfer of property and assets in the United States within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated." The agreement further provided: "The United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in paragraph 12 above the claims of Iran should not be considered legaliy barred either by sovereign immunity purposes or by the act of state doctrine".

This agreement and procedure was in accordance with Executive Order 12284 (46 Fed Reg 7929), issued by President Carter on January 19, 1981, obviously designed to recognize our courts' jurisdiction to entertain such proceed-

ings. Of course, such an agreement cannot impose jurisdiction on the courts of New York State where jurisdiction over the person or subject matter is lacking, or where no cause of action cognizable under our law is stated, or even where *forum non conveniens* requires dismissal.

In essence, the majority are making a political judgment, while disclaiming the "political thicket". As stated by Special Term:

"However complex and pervasive the political aspects of the recent history of Iran may be, it cannot be said that this case is so political in nature as to be 'manifestly nonjusticiable' as alleged by the defendants. When the elements of rhetoric in the complaint are pared away, what remains are causes of action to impress a trust, for an accounting, for an injunction against the transfer of property and for damages. These claims are not political in nature. They are clearly cognizable under the law of this state and are justiciable in our courts.

"In *Baker v. Carr,* 369 U.S. 186, the Supreme Court commented on cases involving political issues: 'Yet it is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.'

"Such an analysis here leads to the conclusion that the issues raised by the complaint are not political issues, but are issues of law involving political entities. These are issues for resolution by the Judicial branch of our government which are not susceptible to resolution by the Executive or Legislative branches.

"The complaint cannot be dismissed under sovereign immunity principles or the Act of State doctrine by express mandate of the terms of the hostage release agreement. Nor will the Court dismiss this action on the ground that it encompasses purely political questions."

Whether the various kings and monarchs described in the majority opinion would or should have had access to our courts or whether they were subject to the jurisdiction of our courts has nothing to do with the issue of *forum non conveniens,* now here. It may well be, as the majority suggests, that a revolutionary regime may not be heard in our courts to pursue assets of their country in the hands of former rulers. That question relates to whether a cause of action is stated, which is not now before the court. Interestingly enough, the majority, disclaiming any knowledge of Iranian law, concludes that the Iranian courts are incapable of dealing with the issues now here. Whether that is so is not involved in the issue of *forum non conveniens.*

The doctrine of *forum non conveniens* presupposes the existence of at least two forums in which the defendant is amenable to process (*Gulf Oil Corp. v Gilbert,* 330 US 501, 506-507, *supra*) — the one in which the action was commenced and the one which is supposedly more convenient for resolving the dispute. One of the essential factors for consideration by the court is the availability of an alternative forum where the plaintiff may obtain effective redress (*Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense* [*Varig*], 22 NY2d 333, *supra*). The burden is on the defendant to establish the availability of a more convenient alternative forum for hearing the case. "The party who seeks to invoke *forum non conveniens* to effect dismissal of the action and eventual transfer to another jurisdiction must clearly establish that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties." (*Bader & Bader v Ford,* 66 AD2d 642, 645, app dsmd 48 NY2d 649, *supra.*)

In effect the majority is suggesting that defendants should be offering Iran as an alternate forum, which a motion to dismiss under *forum non conveniens* requires. Palpably no such offering is now, or ever will be forthcoming, and it would be inappropriate for this court to so direct.

As Special Term stated: "Iran is the logical forum for this litigation. Certainly it is a more convenient forum for the plaintiff Islamic Republic than New York, for the reasons

set forth supra concerning the law to be applied and the availability of evidence. Iran is not necessarily a convenient or adequate forum for the Empress and the Shah's estate, in light of the political upheaval there following the defendant's departure in 1979."

The Empress obviously will not consent to confer jurisdiction upon the courts of Iran, in the interest of self-preservation. But she has failed to identify a more appropriate alternative forum. Special Term's suggestion that the dispute be adjudicated in some international forum such as before an international arbitral tribunal, of the type contemplated in the resolution of the hostage crisis, is at best speculative. The Empress' burden extends to identifying an appropriate forum presently in existence. Her failure to do so leaves New York as a logical choice, considering the late Shah's apparently extensive financial dealings here.

The concurring opinion concludes that the action should be dismissed because the court has inherent power to decline to exercise jurisdiction in the interest of justice, where exceptional circumstances exist, even though no other forum is shown to be available. However, the authorities relied upon are to the contrary. In *Gulf Oil Corp. v Gilbert* (*supra*) the Federal District Court had jurisdiction based on diversity of citizenship. All events giving rise to the litigation had occurred in Virginia. Most of the witnesses resided there. Finding that both State and Federal courts in Virginia were available to the plaintiff, and the defendant was amenable to jurisdiction there, the United States Supreme Court in discussing the court's inherent power expressly stated (330 US, at pp 506-507): "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." It is this doctrine which hitherto was dispositive.

In *Canada Malting Co. v Paterson Co.* (285 US 413) also relied on by the concurring opinion, two ships of Canadian registry and ownership, carrying cargo shipped from one Canadian port to another, collided on Lake Superior while unintentionally in United States waters. One ship sank.

All the parties were citizens of Canada and the officers and crew of each vessel were citizens and residents of Canada. While a suit was pending in a Canadian court to determine liability as between the ships, libels in personam against the owner of one of them were filed by cargo owners in a Federal District Court in New York. It was held that the action should be dismissed on ground of *forum non conveniens*, provided respondent appeared and filed security in any action which might be instituted by the libelants in the Admiralty Courts of Canada. It was in this context that Mr. Justice BRANDEIS, writing for the Supreme Court, stated (285 US, at pp 422-423): "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."

Noto v Cia Secula di Armamento (310 F Supp 639) also relied on in the concurring opinion, was a suit between aliens, arising from an explosion of a tanker in an Iranian port. In declining to exercise jurisdiction the court found another forum was available, expressly stating (310 F Supp, at p 650): "Finally, to decline jurisdiction in these actions deprives plaintiffs of no rights. Their claims can be litigated upon the merits in Italy, their own country, since a five-year statute of limitations applies. Cosarma, a corporation of Italy, is subject to jurisdiction there if plaintiffs decide to sue. Additionally, the active alleged tortfeasors, Cosarma, IOEP, NIOC and BP Tanker, are engaged in litigation before the Tribunal of Rome, wherein each seeks to cast liability upon another for the LUISA disaster. Since plaintiffs' claims are based upon the tortious acts that are the subject of that litigation, under Italian law they may intervene and thus acquire jurisdiction over the non-Italian corporations. Plaintiffs are also in a position to assert their claims against Cosarma in an action commenced

against them by the latter in the Tribunal of Venice for a declaratory judgment that it is not liable to them."

It is plain that *forum non conveniens* was held to be applicable in these cases because there was another forum available to dispose of the litigation.

On this motion we need not concern ourselves with the question of what standard should guide the court in passing judgment on the perquisites of an emperor. If that becomes an issue on the trial of this case, the Trial Judge will know how to deal with it. The issue is not whether this court is called upon to serve as a paymaster of the spoils of empire or as referee between dictators, as suggested in the concurring opinion. The issue is whether the present government of Iran, however much we detest it, has a right to sue in our courts to recover from the former emperor Iranian assets which it asserts he unlawfully converted. The authorities relied upon in the concurring opinion are plainly not in point.

In *Stone v Freeman* (298 NY 268), an action by a seller of goods against a broker to recover that portion of the commission paid to the broker which the seller had agreed was to be paid to the buyer's purchasing agent, the contract was held to be illegal and unenforceable. It is in this context that the court wrote (298 NY, at p 271): "For no court should be required to serve as paymaster of the wages of crime, or referee between thieves. Therefore, the law 'will not extend its aid to either of the parties' or 'listen to their complaints against each other, but will leave them where their own acts have placed them' (*Schermerhorn* v. *Talman*, 14 N.Y. 93, 141). Conforming to that settled rule, this court and its predecessor have several times held that when an agent receives money to be spent for illegal purposes, his principal may not recover back so much of that money as the agent has failed so to spend, particularly when the illegal purpose has been partly or wholly attained and a part of the money expended therefor". *Flegenheimer v Brogan* (284 NY 268), also relied on in the concurring opinion, is similar. The court declined to enforce a contract on behalf of the estate of a decedent who had placed the stock of a corporation in the name of a dummy in order to avoid the licensing laws in connection with the sale of liquor. Decedent would not have been able

to obtain a license because of his record. The court held that an answer was sufficient which alleged that the organization of the corporation and the issuance of its capital stock in the name of the dummy "were part and parcel of a fraudulent plan, contrivance and scheme to keep secret from the Federal and State authorities the identity of plaintiff's intestate as the true undisclosed owner and operator * * * for the purpose of inducing Federal and State authorities to issue permits for the manufacture and sale of beer and ales at said brewery". Defendant had no knowledge of the interest of plaintiff's intestate in the brewery or its capital stock when defendant purchased the same from the dummy. The court held that the transactions were so far against the public good as to disable the plaintiff from invoking the aid of the court in her endeavor to disengage herself from the unlawful conduct of her intestate. Plainly, this has nothing to do with *forum non conveniens* nor with the right of plaintiff to assert that the former emperor unlawfully converted Iranian funds.

It may well be that on the trial of the action the answer to some of these questions will preclude recovery. This has nothing to do with whether we should entertain jurisdiction and even less to do with whether the doctrine of *forum non conveniens* requires that we decline jurisdiction.

Plaintiff's unclean hands are not relevant on the issue of *forum non conveniens*, although perhaps appropriate to a determination on the merits of the action. Moreover, they do not directly relate to the subject matter in litigation (see *National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16). The burden on our courts, albeit heavy, must be assumed, jurisdiction having been obtained and no other forum being available.

Much of the majority opinion relates to the enforceability of any judgment obtained in Iran, and whether, under the Uniform Foreign Money-Judgments Recognition Act (CPLR art 53), such a judgment might be enforceable. That has nothing to do with the issue now here. We are not asked to enforce an Iranian judgment in this action, albeit the treaty between the United States and Iran, above

referenced, provides that such judgments "should be enforced by such courts in accordance with United States law."

New York will discharge its limited responsibility to provide a system of justice applicable to this dispute when it opens its door to the litigation, so that the issue of whether cognizable claims are stated may be litigated on a motion addressed to the substance of the complaint and not on a procedural motion, such as *forum non conveniens.*

Accordingly, the order granting defendants' motion to dismiss on the ground of *forum non conveniens,* denying defendants' motion to dismiss on grounds of lack of personal and subject matter jurisdiction, and denying defendant Farah Diba Pahlavi's motion to amend the caption, should be modified on the law and the facts and in the exercise of discretion as to defendant Farah Diba Pahlavi by denying her motion to dismiss on the ground of *forum non conveniens* and otherwise affirming, without costs, and as to defendant Mohammed Reza Pahlavi by remanding to Special Term for further proceedings pursuant to CPLR 1015 (subd [a]) and 1021.

CARRO and MILONAS, JJ., concur with SILVERMAN, J.; KUPFERMAN, J. P., concurs in an opinion; FEIN, J., dissents in an opinion.

Order, Supreme Court, New York County, entered on November 20, 1981, affirmed. Defendant-respondent-appellant shall recover of plaintiff-appellant-respondent $75 costs and disbursements of this appeal.

DECISION OF JUSTICE KIRSCHENBAUM

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

- - - - - - - - - - - - - - - - - X

ISLAMIC REPUBLIC OF IRAN, :

Plaintiff, :

-against- :

MOHAMMED REZA PAHLAVI and :
FARAH DIBA PAHLAVI,

:

Defendants.

:

- - - - - - - - - - - - - - - - - X

KIRSCHENBAUM, J.

Motions under calendar number 16 of February 25, 1980 and 68 of April 21, 1981 are consolidated for disposition.

On October 22, 1979, the defendants Mohammed Reza Pahlavi, (the late Shah of Iran) and his wife Farah Diba Pahlavi (the Empress), arrived in New York City for the purpose of obtaining hospital treatment for the Shah at the New York Hospital-Cornell Medical Center in Manhattan.

Subsequent to the defendants' ar-

rival in New York, the plaintiff Islamic Republic of Iran, which is the successor governmental regime to the Empire of Iran under the Shah, sought to commence this action for the impressing of a trust, an accounting, an injunction and for compensatory and punitive damages.

The summons states that the Islamic Republic maintains an office for doing business in New York County, which is the basis for placing venue here. The complaint alleges that "As supreme authority in the nation, the Shah held a special position of trust to the government and citizens of Iran concerning the affairs of state. The Shah had a fiduciary obligation to use his authority for the benefit of the government and citizens of Iran and refrain from profiting personally at the expense of the government and citizens of Iran. . . The Shah abused his position of trust and confidence to enrich himself, certain members

of his government and friends, by diverting government funds and property to his own use or the use of others, and accepting payments, bribes, interests in business ventures, and other things of value, in exchange for the grant of government favors, contracts, licenses, franchises and other public benefits. The Shah enriched himself through various schemes carried out secretly with the aid of loyalist government employees, busnessmen, and others, in a massive plan to defraud the government and the citizens of Iran, which secret and fraudulent activities continue to the date hereof." The Empress is alleged to have collaborated with the Shah in the furtherance of these acts.

Based on these allegations, the Islamic Republic seeks a judgment:

1. impressing a trust, in favor of the plaintiff on any and all assets of the defendants;

2. for an accounting by the defendants and for payment to the plaintiff by defendants of any and all money and property of any kind received by them from the plaintiff or its predecessor;

3. enjoining the defendants from transferring, removing or disposing of any assets owned or controlled by them;

4. for compensatory damages in the total amount of twenty-five billion dollars against the Shah;

5. for punitive damages against the defendants totalling one billion, five-hundred million dollars; and

6. for a judgment of thirty billion dollars for conversion by the defendants of money and property in 1978 and 1979.

Counsel for the Islamic Republic attempted to effect personal service of the summons and complaint upon the Shah

and the Empress. When these attempts were unsuccessful, plaintiff's counsel applied to the Court under CPLR 308(5) for an order directing a method of service. In an order dated November 30, 1979, Justice Bentley Kassal of this Court provided:

> "Ordered that service of a copy of the verified summons and complaint in the above captioned action be made on Mohammed Reza Pahlavi a/k/a The Shah of Iran or The Shah by personal service at the New York Hospital located at 525 East 68th Street, 17th Floor, New York, New York or, in the alternative, upon the Administrator or Night Administrator of New York Hospital located at the above mentioned address in the manner prescribed in CPLR 308(2) or (4) together with certified mail delivery of a copy of these papers upon the following named individuals and/or agency at the listed addresses. Such mailing shall be deposited in the mail box or post office no later than 6 p.m., Monday, December 3, 1979:
>
> (1) Hon. Cyrus Vance, Dept. of State, Wash., D.C.;
>
> (2) Hon. Henry Kissinger, c/o NBC News, Rockefeller Center, 30 Rockefeller Plaza, New York City;
>
> (3) David Rockefeller, Chase Manhattan Bank, Chase Manhattan

Plaza, New York, N.Y.;

(4) District Director, Immigration and Naturalization Service, New York District Office, 26 Federal Plaza, New York City."

Judge Kassal also signed a statement in conjunction with his order providing that:

"the signing of this Order does not constitute a determination by me that this Court has jurisdiction over the subject matter of this controversy or over the person of the named defendant, Mohammed Reza Pahlavi. As required by CPLR 308-(5); the signing of this order constitutes a determination only that the method of service directed herein satisfies prima facie due process and is reasonably calculated to give said defendant notice of this action and an opportunity to respond thereto."

Counsel for the Islamic Republic fully complied with Justice Kassal's order. In addition, service was made in person upon Robert Armao and Richard Armao (who were spokesmen and representatives of the Shah at that time), and by mail to the Shah at the New York Hospital, at a Beekman Place address

where the Empress was staying, and at the Armao's business office. The Empress was served by a New York City Deputy Sheriff at her residence and by mail. No answer to the complaint has been served.

In February, 1980, the Shah and the Empress moved through New York counsel to dismiss the complaint on three grounds.

First, it is alleged that the Court lacks personal jurisdiction over the defendants. In general, the defendants state that none of the parties has any connection with this state and that there are no claims asserted by the plaintiff with respect to transactions or occurrences which either took place here or had any effect here.

Specifically, the mailings made pursuant to CPLR 308(2) are alleged to be improper. That section requires mailing to the "last known residence," as well

as delivery to a person of suitable age and discretion. All mailings here (to the Armao's office, to the Beekman Place address where the Empress was staying and to the New York Hospital) were allegedly not to the Shah's last known residence, which had been Mexico. Thus, the defendants conclude that "this case represents the often criticized situation in which personal jurisdiction can be based, at best, only upon service within the state upon a non-resident, and that only by substituted service."

Second, the defendants assert that the action should be dismissed under the doctrine of forum non conveniens. They state: "This is a matter between a foreign revolutionary state and the former constitutional monarchs of that state. There is no claim raised which arose or had any effect in New York. The only connection to this jurisdiction is the defendants' brief presence in New York

due to the hospitalization of the Shah, and under the doctrine of forum non conveniens a New York court may decide not to hear a matter which does not have a substantial nexus to New York."

Third, the defendants have identified this action as political in nature. They assert that "the conduct of the prior government of Iran presents inappropriate questions for resolution by a New York Court" and that this case "is in substance only one more element in plaintiff's worldwide political campaign to discredit the Imperial Government of Iran, dressed up as a lawsuit in order to provide plaintiff with yet another platform from which to wage that campaign. It presents manifestly non-justiciable issues and political questions, inextricably entangled in a violent internal upheaval in Iran and a continuing international controversy of monumental proportions, which issues and questions

are singularly inappropriate for judicial consideration."

Following submission of the defendants' motion to dismiss, oral argument was held, against the backdrop of the continuing hostage crisis in Iran.

With respect to the issue of personal jurisdiction, the Islamic Republic stressed that the posting of armed bodyguards by the Shah outside his hospital room amounted to a deliberate effort to evade service of process. It should be noted that hospital security personnel, Iranian military men armed with machine guns, and New York City Policemen armed with shotguns were posted throughout the hospital to insure the safety of the Shah, to thwart access to him and perhaps for other reasons. Therefore, it is asserted that the Shah should be estopped from denying that service of process was proper, because his own conduct prevented the summons from being

left with him.

Concerning the issue of proper mailing of the summons and complaint under CPLR 308(2) and (4), the plaintiff argues that at the time of mailing, the New York Hospital was the Shah's only residence because on November 29, 1979, the day before Justice Kassal signed the service order, the Government of Mexico withdrew the temporary visas of the defendants and refused to permit them to re-enter Mexico. Since this action by Mexico was widely reported by the media, the plaintiff concludes that "it is only logical that the Court would direct the mailing to the actual dwelling place of the Shah, instead of to a dwelling which the defendant could not return to" and "the only logical interpretation of the order was to mail the papers to the Shah at the New York Hospital."

The plaintiff responds to the forum non conveniens argument by alleging that

the defendants have not met their burden of showing that a viable alternative forum exists. The major points of law set forth on this issue are that the court must justifiably believe that an alternative forum will take jurisdiction and that the court should not even begin to balance relevant forum non conveniens considerations until it has found there is an existing alternative forum.

The Islamic Republic approaches the issue of subject matter jurisdiction by identifying this controversy as a legal dispute over property ownership. The plaintiff asserts that "the Supreme Court of New York clearly can redistribute property owned by the defendants which is located within New York State, as well as gain full faith and credit to its judgment in other states." Also, "the political questions doctrine looks to the issues, instead of the parties." And, "the sole question, then, is wheth-

er there are inextricable political questions barring resolution of the issues." Furthermore, "Determining whether there has been a misappropriation of government funds does not in itself resolve any political dispute; nor does determining whether there has been a conversion; breach of fiduciary duty; or wrongful expenditure. . ." Also, "Foreign nations must be permitted to sue their former public officials for breaches of trust within United States borders; whether their claims are meritorious is for a court of law to decide." Finally, "Misappropriation of funds from a foreign nation by a former public official of that nation has never been held to be a non-justiciable political question."

After presentation of arguments on the defendants' motion to dismiss, two events of great significance took place that had the effect of suspending this

litigation for a period of months. First, the United States Attorney for the Southern District of New York, at the suggestion of the Attorney General of the United States, filed a Suggestion of Interest of the United States in this action. That document provided, in relevant part, that "The United States is deeply concerned that proceedings on the issues now pending before this Court at this time will create a serious risk of prejudicing the continuing efforts of the United States Government to resolve the hostage crisis. . . Therefore, the United States respectfully requests this Court to defer decision on the issues now pending before it. The United States will promptly inform the Court of any changed circumstances that would warrant modification of this Suggestion."

Second, the Shah, having left New York, died in Cairo, Egypt on July 27,

1980.

In response to the Suggestion of Interest, the parties agreed to an adjournment. Later, in January, 1981, shortly after the agreement between the United States and Iran providing inter alia for the release of the hostages had been signed, the United States Attorney, through a Statement of Interest, requested a further delay until February 26, 1981, to give the incoming Reagan Administration an opportunity to review the agreement. Then, on February 26, 1981, the United States announced that no further adjournments would be requested by the United States and that the Reagan Administration would honor the terms of the hostage release agreement as signed by the Carter Administration.

The agreement, submitted in full to the Court by the United States, touches briefly on this case. Point IV, para-

graph 12 provides that in part: "the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law."

Paragraph 14 provides in part: "the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles

or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law."

On April 21, 1981, the defendants moved pursuant to CPLR 1003 to drop the Shah as a party defendant by reason of his death and to amend the caption accordingly. Also on April 21, the petition in a companion proceeding was filed under Index Number 6790/81 bearing the caption Paul O'Dwyer, on behalf of the Islamic Republic of Iran, Petitioner, and Hon. Bruno Cappellini, Public Administrator of the City of New York, as representative of the Estate of Mohammed Reza Pahlavi, deceased, Respondent (The Letters of Administration Proceeding).

Paul O'Dwyer is the attorney for the Islamic Republic in this action. He was authorized by the Islamic Republic to commence the Letters of Administra-

tion proceeding on the theory that the Islamic Republic is a creditor of the estate of the Shah. O'Dwyer's petition alleges that "the decedent was the owner of vast amounts of property, both real and personal, now located within the confines of New York County, the full extent of which will become more clearly defined as the discovery processes of the Court become utilized." This allegation is supported by photocopies of a number of documents and letters ranging in date from the early 1940's to the late 1970's concerning various banking transactions of the Shah with New York City banks. O'Dwyer concludes that it will be impossible for the United States to carry out its obligations in this case under Paragraph 12 of the hostage release agreement (quoted supra) unless a representative is appointed to represent the decedent.

The Empress opposes the petition.

Her objections are summed up in her memorandum of law as follows: "The petitioner here fails to set forth the existence of any property left by the Shah in New York. Absent such a showing, this Court cannot grant letters of administration to anyone. Granting letters where no property has been left by a decedent in a court's jurisdiction would be a meaningless act and a waste of time both for the court and the administrator. Where there is no property, there is nothing to be administered. Where there is nothing to be administered, there is no need for an administrator."

Bruno Cappellini, the Public Administrator of New York County, answers the petition by stating that the Surrogate's Court of New York County is the proper forum for such a proceeding. Mr. Cappellini observes that "If this Court declined to exercise jurisdiction in the

appointment and dismissed the petition, I would be able to petition and receive letters of administration on the decedent's estate in one day." He therefore asks that the petition be dismissed and that he be permitted to petition the Surrogate's Court for his appointment as administrator.

Personal Jurisdiction

In Dobkin v. Chapman, 21 N.Y.2d 490 (1968), the Court of Appeals discussed CPLR 308(5) [then designated as 308(4)] as follows:

> "Paragraph 4 itself contains no words limiting the court's discretion except those requiring the court to be satisfied that service is 'impracticable' under paragraphs 1, 2 and 3. Those first three paragraphs contain whatever specific prescriptions the draftsmen wished to impose on the service of process. In paragraph 4, however, for use in the unpredictable circumstances in which plaintiff could not follow the prescribed methods, the court was given the discretion to fashion other means adapted to the particular facts of the case before it. If the paragraph is to

be meaningful, the court's discretion under it must be broad. . ."

"There is no constitutional prohibition against court-devised methods of service as long as they are reasonably calculated to give defendant notice of the lawsuit and an opportunity to be heard (Milliken v. Meyer, 311 U.S. 457). CPLR 308 (subd. 5) is purely a notice, not a jurisdiction conferring, statute. Present a basis of jurisdiction, an expedient order under CPLR 308 (subd. 5) may be framed." (Arroyo v. Arroyo, 76 Misc.2d 652).

Here, Justice Kassal specified that service upon the Administrator or Night Administrator of New York Hospital take place in the manner prescribed in CPLR 308(2) or (4), which require mailing the summons to the person to be served at his last known residence. Therefore a significant part of the debate is focused on the issue of whether Mexico or New York Hospital was the Shah's "residence" for purposes of mailing. However, the larger issue is whether any basis for jurisdiction existed in the first place.

Here, the physical presence of the Shah and the Empress in New York City provided a basis for obtaining personal jurisdiction over them. This principle is identified in Pennoyer v. Neff, 95 U.S. 714, 722:

"One of these principles is, that every state possesses exclusive jurisdiction over persons and property within its territory."

> "Historically, the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." (International Shoe v. Washington, 326 U.S. 310, 316).

Although the Shah was here for medical treatment at a hospital, and never took up residence at a place of abode, his presence here was sufficient to subject him to personal jurisdiction of this court, provided that the method of service was reasonably calculated to

give him notice of the action and an opportunity to be heard.

On that issue, when CPLR 308(2), which was specified by Justice Kassal as a guideline for substituted service on the Shah, is read in conjunction with the opinion of the Court of Appeals in Feinstein v. Bergner, 48 N.Y.2d 234, it is clear that service was carried out by the plaintiff in accordance with the statute. The relevant portion of CPLR 308(2) provides that service may be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence."

Here, there is no doubt that the service upon the Night Administrator of the New York Hospital (a person of suitable age and discretion) accompanied by

mailing to the Shah at New York Hospital (his actual "residence" at that time) was in compliance with CPLR 308(2) and conferred personal jurisdiction under the statute. In Feinstein, supra, the Court stated: "Of course, we assume that plaintiffs will mail copies of the summons to the defendant's actual residence where that address is known. (See Siegel, New York Practice, see 72, at pp. 77-78). Indeed, in cases where the defendant's residence is known, the actual dwelling place and last known residence would be the same location by definition."

Personal jurisdiction over the Empress was also obtained by service in compliance with CPLR 308(4) by the Sheriff of New York County at her actual place of residence.

Accordingly, the branch of the motion to dismiss the complaint for lack of in personam jurisdiction is denied.

Political Question

The branch of the motion to dismiss the action on the ground that it presents "manifestly nonjusticiable issues and political questions" concentrates on the political events in Iran that led to the overthrow of the Shah and the ascendency of the Islamic Republic. There is no question that this dramatic governmental upheaval found its roots in intense doctrinal differences of a political and religious nature, and became a major concern of American foreign policy and American politics.

However complex and pervasive the political aspects of the recent history of Iran may be, it cannot be said that this case is so political in nature as to be "manifestly nonjusticiable" as alleged by the defendants. When the elements of rhetoric in the complaint are pared away, what remains are causes of action to impress a trust, for an ac-

counting, for an injunction against the transfer of property and for damages. These claims are not political in nature. They are clearly cognizable under the law of this state and are justiciable in our courts.

In Baker v. Carr, 369 U.S. 186, the Supreme Court commented on cases involving political issues: "Yet it is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particula question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

Such an analysis here leads to the conclusion that the issues raised by the

complaint are not political issues, but are issues of law involving political entities. These are issues for resolution by the Judicial branch of our government which are not susceptible to resolution by the Executive or Legislative branches.

The complaint cannot be dismissed under sovereign immunity principles or the Act of State doctrine by express mandate of the terms of the hostage release agreement. Nor will the Court dismiss this action on the ground that it encompasses purely political questions.

Forum Non Conveniens

The doctrine of forum non conveniens is described by CPLR 327:

> "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action

shall not preclude the court from staying or dismissing the action."

This provision is discussed in Siegel, New York Practice, sec. 28, p. 27 -- "The doctrine of forum non conveniens, or inconvenient forum, is largely the product of case law. It is a body of rules designed to keep out of the New York courts cases in which jurisdiction technically exists both of the subject matter and of the person, but where there are no significant New York contacts such as to warrant entertainment of the case. If, for example, plaintiff is a non-resident and brings a $20,000 foreign claim against defendant in the Supreme Court, the non-resident defendant being served with summons while passing through New York, the court secures jurisdiction of defendant, at least under present law. But if the case has nothing to do with New York, it should not be the burden of the New York court

system and the New York taxpayer who supports it."

The body of rules referred to by Professor Siegel finds expression in Varkonyi v. Varig, 22 N.Y.2d 333, 337. "Our courts, however, are under no compulsion to add to their heavy burdens by accepting jurisdiction of a suit between nonresident parties on a cause of action having no nexus with this State. The question whether such a suit should be entertained is one which is in general committed to the discretion of the courts below, to be exercised by reviewing and evaluating all the pertinent competing considerations. . . Among the pertinent factors to be considered and weighed, in applying the doctrine of forum non conveniens, are, on the one hand, the burden on the New York courts and the extent of any hardship to the defendant that prosecution of the suit would entail and, on the other, such

matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State."

Further discussion appears in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509: "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . Factors of public interest also have place

in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed on the people of a community which has no relation to the litigation. . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

When these relevant considerations are applied to the facts of this case, it is clear that New York is an inappropriate forum for this litigation. Quite simply, this case has no connection with New York and none is alleged, save for the suggestion that the Shah deposited funds in banks located in this State.

The events complained of occurred in Iran, must be analyzed under the laws of Iran, and in general involve the people of Iran. It appears that the witnesses required to testify concerning the allegations of the complaint will be Iranians beyond the subpoena power of this State. An unnecessarily heavy burden would be placed on the courts of New York to accept jurisdiction of a suit between nonresident parties on a cause of action having no nexus with this State.

An important consideration is the availability of an alternate forum -- "forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties." (Silver v. Great American Insurance Company, 29 N.Y.2d 356, 361).

Iran is the logical forum for this litigation. Certainly it is a more convenient forum for the plaintiff Islamic Republic than New York, for the reasons set forth supra concerning the law to be applied and the availability of evidence. Iran is not necessarily a convenient or adequate forum for the Empress and the Shah's estate, in light of the political upheaval there following the defendant's departure in 1979.

Any statement by the Court that the defendants could not be guaranteed a fair trial in Iran would involve a degree of speculation and requires information concerning the functioning of the present Iranian courts that has not been made a part of the submissions on these motions.

Dismissal of this case on the ground of forum non conveniens is mandated by the facts and under all relevant considerations set forth in the

controlling case law. The dismissal of the action does not require, nor is it suggested that this case be recommenced in Iran, but leaves open the possibility that the issues raised by the complaint may be adjudicated by an International Arbitral Tribunal (of the type established for Iranian assets claims by the agreement for the release of the hostages), or by another international forum.

The branch of the motion to dismiss the action for forum non conveniens is granted.

The motion by counsel for the Shah pursuant to CPLR 1003 to remove the Shah as a party defendant by reason of his death is denied. The proper procedure is described by CPLR 1015 -- "If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." The death of the Shah has not

extinguished the claims raised in the complaint. Although the Court is dismissing the action on the ground of forum non conveniens, as a practical matter this does not mean that the entire case and the claims it asserts is at an end, for all purposes and in all forums. The name of the Shah should remain in the caption.

The petition of Paul O'Dwyer in the related Letters of Administration proceeding is denied. The exhibits submitted by the petitioner are wholly inadequate to establish that the Shah owned any property of any kind within this jurisdiction, and does not amount to the statement required by Surrogate's Court Procedure Act 1002(2) that the deceased left property in New York. The petition is dismissed.

For the foregoing reasons, the complaint is dismissed.

Settle order.

Dated: September 14, 1981.

_____

J.S.C.

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPULIC OF ALGERIA

"GENERAL DECLARATION"

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

General Principles

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of

such claims through binding arbitration.

Point I: Non-Intervention in Iranian Affairs

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Points II and III: Return of Iranian Assets and Settlement of U.S. Claims.

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having

been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

Assets in the Federal Reserve Bank

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Banks

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of United States banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until

such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of United States law applicable prior to November 14, 1979, for the transfer to Iran of

all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

Nullification of Sanctions and Claims

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in United States litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by United States law.

13. Upon the making by the Government of Algeria of the

certification described in Paragraph 3 above, the United States will order all persons within United States jurisdiction to report to the United States Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by United States law.

14. Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United States will make known, to all appropriate United States courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a United States court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

Settlement of Disputes

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

"CLAIMS SETTLEMENT DECLARATION"

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of

the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that declaration.

ARTICLE III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.